AN ESTATE PLANNING MANUAL

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INTRODUCTORY STATEMENT

This manual has been prepared in order to provide a reference tool for the numerous concepts, terms and phrases used in the planning and drafting of Wills and Trusts and to deal briefly with Health Care Proxies, Living Wills and Durable Powers of Attorney. Since the expressions which this manual defines are extremely technical, in that they encompass statute law, case law and tax law, no attempt will be made to provide an "in depth" analysis, but only basic definitions and descriptions thereof.

DISCUSSION

A "Will" is a written instrument wherein an individual (the testator) directs the disposition of his property upon death, appoints the fiduciaries who will administer the terms of the Will, and sets forth declaratory and explanatory instructions. It is important to note that a Will does not dispose of all of a decedent's property, since oftentimes a decedent's property is owned in such a manner that upon the death of a decedent the property automatically passes to a third party without reference to the Will. For example, where a decedent owns property jointly with another person (with right of survivorship), upon the decedent's death, such property is automatically owned by the survivor. Another example of property passing "outside of the Will" is insurance payable to a named beneficiary (other than the decedent's estate). Yet another

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example of the foregoing is property which is held in trust or a trust bank account, such as a decedent having a trust account for the benefit of a grandchild. Upon the death of the decedent, the bank account would belong to the grandchild. The terms used to differentiate between property of a decedent passing through the Will, or outside the Will, are "probate assets" and "non-probate assets", the former being the property that the Will provisions dispose of, and the latter being the property not subject to the Will.

A. Dispositive Provisions.

The manner by which a testator may dispose of property under a Will is subject to great variation. For example, the gift (as any disposition under a Will may generally be referred to) may be made "outright", or "in trust", or a combination thereof. In addition, the nature of the gift, bequest, or devise, may be specific or general, conditional or unconditional, etc.

1. "Outright Gift" – A simple example of an outright gift is: "I give and bequeath the sum of $1,000 to John Jones". Such gift is unconditional, unencumbered by trust, and upon the death of the testator, "John Jones" would receive the sum of $1,000, assuming that the probate estate had sufficient funds to pay such gift.

2. "In Trust" – In contrast to the "outright" gift, a gift "in trust" disposes of the property involved by giving the legal title to the property to a "Trustee", and the equitable title to a "Beneficiary". The Trustee holds the property (the principal), which can be tangible, intangible, real, personal, or mixed, pursuant to the directions of the testator, and pays or applies interest or principal, or a

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combination thereof, to the Beneficiary, all pursuant to the terms of the Will. An example of a simple gift "in trust" is:

> "I give and bequeath to my Trustee the sum of $10,000. My Trustee shall pay the income therefrom to my son, Jim, until he is twenty-one years old, and at the time my said son reaches the age of twenty-one years, my Trustee shall pay over the principal of the Trust to my son."

As will be noted from the foregoing example, the Trustee is made the owner of a $10,000 gift until the son reaches the age of twenty-one years. During the period of the Trust, the Trustee is obligated to pay the son all of the income derived from the trust property, but the principal (the $10,000) is only delivered to the Beneficiary upon the Beneficiary attaining the age of twenty-one years. Details as to how the Trustee may invest the principal, etc., are covered in the "Fiduciary" provisions of the Will (see below).

3. "Conditional Gifts" – Whether a gift is made "outright" or "in trust", the same may be "conditional". Examples of "conditional" provisions are as follows:

> (a) "I give and bequeath to my daughter, Joan, if she is married at the time of my death, 1,000 shares of my AT&T stock"; or
>
> (b) "I give and bequeath to my son, John, the sum of $10,000, provided my estate, for tax purposes, exceeds $100,000".

In the first of the above examples, the gift of the stock is conditioned upon the marriage of the testator's daughter. In the second example, if the testator's estate were only $99,000, the testator's son, John, would receive no part of the gift of $10,000.

4. "Specific Bequests" – Specific bequests involve gifts of definitely ascertainable property, such as a gift of a particular piece of jewelry, or a certain

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antique, or enumerated stock certificates and bonds, or a certain parcel of real property, etc. This class of gifts, pursuant to law, is the last to be applied to the debts of the decedent or taxes of the estate, and to this extent is favored by the law. However, where the specific gift is not owned by the decedent at his death, or is insufficiently described, then the gift is "adeemed" (lost), and no substitution is made therefor. It is imperative to the success of a specific bequest that the property be adequately described and that the testator actually owns such property at the time of death.

5. "Demonstrative Bequests" – The "demonstrative" legacy is a bequest of a certain sum, stock, or the like, payable out of a particular fund or security, i.e.: bequest of $1,000 payable out of the proceeds of a specific bond and mortgage. If the fund designated for the payment of the legacy fails, resort may be had to the general assets of the estate.

6. "General Bequests" – This type of bequest is exemplified by a gift of $1,000 or a fractional portion of the testator's estate, for example:

> "I give to my wife one-half of my estate"; and/or
> "I give my personal belongings to my son, James".

From the examples given, it will be observed that the subject of the gift is not particularized in the same manner as the "specific bequests", discussed above. Where the assets of an estate are insufficient to pay the debts of the decedent and the estate taxes, the law requires that the general gifts be applied first to the payment of such obligations, and where such payments are necessary, the gifts are "adeemed" to the extent that they are reduced thereby. The law further differentiates between personal property, that is, all property other than interests

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in real estate, and real property. General bequests of personal property are "adeemed" prior to general devises of real property.

7. "Marital Bequests" – Pursuant to the federal estate tax statutes, all bequests made by the testator to the testator's surviving spouse are deductible from the adjusted gross estate of the testator. For example, if a testator's gross estate were $6,530,000, after deducting administrative and funeral expenses of $100,000, the adjusted gross estate would equal $6,430,000. If the testator made a bequest to his or her surviving spouse in the amount of $3,430,000, then the federal (and New York) taxable estate would be reduced to $3,000,000. If there was a "unified credit trust", the 2015 federal exemption amount of $5,430,000 (and the April, 2015 New York exemption amount of $3,125,000) would be applicable and the federal (and New York) estate tax would be zero. Obviously, the "marital deduction" is one of the most important devices for estate and tax planning. The marital deduction includes property passing through the Will (probate assets), as well as property passing outside the Will. In order for a bequest to qualify for the marital deduction, it must meet the technical requirements of the estate tax statutes, and great care must be taken that such requirements be met. The marital bequests may be made either "outright" or "in trust" (see above – Dispositive Provisions) provided, however, that the marital bequest, if made via a trust, must be drafted to provide that the trust principal, upon the death of the surviving spouse, may be freely conveyed by or according to instructions of the surviving spouse. In most cases, where the estate exceeds the federal exemption amount, a qualifying marital bequest is almost an automatic

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requirement in order to reduce estate taxes. However, in certain instances where the surviving spouse's estate is equal to or greater than the testator's estate, the amount of the marital bequest should be reduced to avoid "double taxes" upon the death of the surviving spouse. The marital deduction may be achieved in a variety of forms.

8. "A Unified Credit or Federal Exemption" – A unified credit offsets gift and estate taxes. An estate tax is imposed on a decedent's estate based on the value of the estate assets (including life insurance!). In 2015, the Federal exemption amount is $5,430,000 and the lifetime gift amount is the same. The maximum estate tax rate is 40%. (The New York exemption amount is currently [as of April 1, 2015] $3,125,000 and New Jersey's is $675,000). Estate Tax planning minimizes estate taxes and is an imperative part of planning with many clients.

9. "Residuary Bequests" – The residuary disposition is that part of a testator's estate not disposed of elsewhere, either by specific or general bequests. Usually, this provision is the last of the dispositive clauses, and the same is intended to include not only all property not otherwise disposed of but, in addition, conditional gifts that fail to take effect and legacies which are renounced. The residuary bequest may be made outright or in trust, and in a majority of Wills the residuary bequest is in the form of an extended trust arrangement wherein the testator provides for his surviving spouse, children and grandchildren.

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B. Fiduciary Provisions.

A Fiduciary is a general term for a person named as either an Executor, Trustee, or Guardian under a Will. Fiduciaries may be individuals or banks, one person or several persons, acting in the same capacity. Every testator must name an Executor, and if the Will contains any trust provisions, a Trustee. Guardians are normally appointed only where the testator leaves minor children. In addition to naming the initial fiduciaries, the testator should also name substitute fiduciaries in the event the fiduciary originally named has either died or is incompetent, or is unwilling to serve at the time the Will becomes effective, or thereafter.

1. "Executor" (or "Personal Representative" in Florida, for example) – The Executor is the fiduciary named in a Will who has the responsibility to cause the Will to be probated, to collect the assets of the estate and to dispose of same pursuant to the provisions of the Will. The Executor has the responsibility of filing Federal and State estate tax returns, and income tax returns, filing a final accounting, disposing of claims against the estate, and many other details, as set forth in the Will, sometimes even including the funeral arrangements for the decedent. Where the testator is the owner or partner in a business or businesses, the Executor may have the additional responsibility of running the business or disposing of same. The duties of an Executor may extend from a minimum of seven months to a period of several years, depending upon the assets of the estate and the latitude given by the testator to the Executor. The feminine of Executor is "Executrix".

2. "Trustee" – A Trustee is the fiduciary who is given legal title to property disposed of by trust. The Trustee has the obligation of obtaining the trust property from

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the Executor of the Will, and thereafter investing the same in accordance with the powers granted to the Trustee by the testator in the Will. The Trustee must periodically account for the trust assets and must pay over or apply the interest or profits earned by the trust principal and the principal itself at the time specified and to the person specified in the trust provision. Oftentimes, a Trustee is given discretionary powers by the testator. An example of the foregoing is a situation where the testator makes a gift in trust for the benefit of a minor, with direction to the Trustee to pay only the income earned by the trust principal to the minor until such time as the minor reaches majority (age of majority depends on state law), with the additional authorization that if the Trustee believes it for the best interests of the health and welfare of the minor, he may pay portions of the principal to the minor prior to the applicable age of majority. The foregoing authority is common where the testator is particularly concerned with the education of an infant beneficiary, and is referred to as an "invasionary power".

3. "Guardian" – The Guardian is the fiduciary who is appointed by the testator to take custody of the decedent's minor children and the children's property. Where the decedent leaves a surviving spouse, such spouse, except in instances of incompetency and other unusual circumstances, is by law the Guardian of the decedent's infant children. Where the spouse of the decedent fails to survive or where the spouse, having survived the decedent, thereafter dies, it is essential that the testator appoint Guardians and alternate Guardians. Extreme care must be taken in the appointment of Guardians, since, in effect, the Guardians will replace the decedent as the parent of the decedent's children, and the children will usually reside at the Guardian's household and become a member of the Guardian's immediate family. Therefore, in selecting a

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Guardian, consideration must be taken that the Guardian will be of proper age, will have similar views on education as the testator, will be able physically to cope with the testator's children and will accept the responsibility of the position.

4. "Bonds" – The law provides that unless the testator makes contrary provision in the Will, each of the fiduciaries named must file a bond, upon appointment, and maintain such bond until the fiduciary is released by the Surrogate's Court from responsibility. Since the premiums for bonds and the costs of obtaining same are properly chargeable by the fiduciary against the estate, in many instances the testator provides that the fiduciaries shall serve without bond, especially where the fiduciaries are related or have close personal ties with the testator. Therefore, it is discretionary with the testator as to whether one or more of the fiduciaries shall serve with or without bond.

5. "Commissions" – Fiduciaries are entitled to receive certain fees and commissions for performing their duties. The statute specifically provides the method by which such fees and commissions are to be computed, and if the testator does not provide in the Will to the contrary, the fiduciaries are entitled to receive the statutory fees and commissions. In certain circumstances, a testator may desire to make a gift under the Will to a named fiduciary in lieu of fees and commissions, and in the provision appointing said fiduciary, the testator may specifically provide that such gift is intended in payment of the statutory commission. Under the current New York Law (§ 2307 of the Surrogate's Court Procedure Act), for example, rates of commissions for Executors are:

For receiving and paying out all sums of money	
Not exceeding $100,000	5%
Additional sums not exceeding $200,000	4%
Additional sums not exceeding $700,000	3%

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Additional sums not exceeding $4,000,000	2½%
All sums over $5,000,000	2%

In New York, for example, an Executor is not entitled to commissions on non-probate assets and specific devises of real property. Three Executors are entitled to three full commissions if an estate is $300,000 or more.

6. "Powers of Fiduciaries" – The manner in which the Executor and Trustee may deal with the assets of the estate and trust principal is set forth in a provision in the Will referred to as the "Powers Clause". The testator may give the fiduciaries very limited powers or, conversely, may empower the fiduciaries to invest in all kinds of securities (whether listed on stock exchanges or not), to operate the testator's business, and, in certain instances, to handle the assets of the estate and the principal of a trust in a "speculative" manner. Irrespective of the latitude granted by the testator, the fiduciaries are required by law to act in a "prudent and reasonable" manner, and even though a fiduciary has been given wide powers, his counsel will advise the investments be limited to the least speculative ventures. Aside from the general "powers", fiduciaries are sometimes given additional powers, such as the power of a Trustee to invade the principal of a trust. An even wider discretionary power which may be conferred upon a Trustee, is the power to "sprinkle" the income of a trust amongst the several beneficiaries thereof.

C. Declaratory and Explanatory Provisions.

In addition to the disposition of a testator's property and the appointment of fiduciaries, the testator includes provisions in his Will declaring his intent regarding certain transactions or explaining reasons for directions in the Will.

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1. <u>"Burial"</u> – The testator may desire a certain funeral procedure, or may request that his or her body be cremated, or that his grave be given perpetual care, etc.. In the same light, a testator may desire that his body or certain parts thereof, be given to science, or scientific foundations, or the "Eye-Bank". Such provisions should be contained in the testator's Will and his driver's license, for example, in New York.

2. <u>"Explanatory Provisions"</u> – The inclusion of such provisions helps to avoid extended attempts to "break" Wills and prolonged litigation. Examples of "explanatory provisions" include suggestions to Trustees regarding reasons for invasion of trust principal; scope of reference to testator's children (in the Will); and reasons for omitting a child or children from the Will.

3. <u>"Common Disaster" Clause</u> – The law of the State of New York, for example, sets forth that in the event a decedent and a person named in the decedent's Will die at the same time, or under circumstances where it is impossible to ascertain which of the persons survived the other, it will be deemed, unless the Will provides to the contrary, that the testator survived the other party. In the case of a married couple, the intended marital deduction bequests would be lost, since there would not be a surviving spouse. On the other hand, if the Will provides that in the event of the simultaneous death of a testator and his or her spouse, the spouse is presumed to survive the testator, for the purposes of the Will, then, even though the testator's spouse died simultaneously with the testator, the marital deduction would be available. A declaratory provision may also be made with respect to common disaster with any other person or persons named in

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the Will. In the alternative, the testator may provide that if his wife (or any other legatee) does not survive him for a period of, for example, three months, she will not be deemed to have survived him for the purposes of the Will, and her bequest would be paid to some other person. In contrast to the common disaster clause, the extended provision is called a "time" clause.

4. "Tax Apportionment" – The testator has the option to mandate which parts of his property will bear the imposition of the estate taxes. To preserve specific gifts, and to avoid reduction of the marital and charitable deductions, it is important that the Will be drafted in a manner so that the foregoing categories of gifts do not have estate taxes allocated against them. To the same effect, administration expenses may be allocated among the various assets.

5. "Business Continuation" – Declaratory and instructional advice to the fiduciary regarding continuation of a testator's business and the carrying out of a buy-sell agreement the testator may have entered into with the respect to this corporation or partnership, are important elements of a Will. In this regard, the testator may recommend that the Executor consult with certain people concerning the sale of a business interest or employ certain persons to continue the business of the testator.

6. "Non-hypothecation" – The phrase "non-hypothecation" refers to provisions in a Will, which restrict legatees and beneficiaries from sale or assignment or pledging of their interests in the Will. This provision is a form of insurance that the legatee or beneficiary will not squander or dispose of the

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testator's gift prior to the receipt thereof, and in the case of a trust, that the beneficiary will not discount in advance his or her interest in the trust principal.

7. "In terrorem" Clause" – This provision is used in situations where the testator may reasonably expect a legatee or beneficiary to contest the terms and provisions of the Will. The provision provides that any person who asserts any other claim against the Will, or contests the Will, shall forfeit all bequests, devises, and appointments to him or her. The clause, in effect, places the party who desires to contest the Will, in peril of losing the gift made to him or her under the terms of the Will, if such person actually contests the Will.

D. "Miscellaneous Definitions" – (Proviso: Check relevant state law – the following definitions are specific to New York law.) In addition to the main body of terms and definitions discussed hereinabove, certain words of art are frequently used in connection with the Will, and the following are their definitions:

"Devise" – A gift of real property.

"Bequest" or "Legacy" – A gift of personal property.

"Per Stirpes" – "*Per Stirpes*" is used to define a system of distribution among heirs, and is contrasted in definition to the phrase "*per capita*". "*Per Stirpes*" means "by right of representation" rather than "by right of number". For example, if a testator made a gift of $100,000 to his children, in equal shares, *per stirpes*, and the testator had a son and a daughter, the son having four children of his own and the daughter having one child of her own, and both the son and daughter died prior to the death of the testator, under the "*per stirpes*" system, the son's children would each receive $12,500 and the daughter's child would receive

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$50,000. In short, pursuant to a gift "*per stirpes*", the persons next in the lineal descent divide the share to which their parent would have been entitled. Under the same example, if the bequests were made "*per capita*", each of the testator's five grandchildren would equally receive $20,000, i.e. according to the total number of legatees.

"Per Capita" – (See "*Per Stirpes*" above.)

"Corpus" – The term "corpus" is synonymous with "principal" when referring to a trust. The phrase "trust corpus" is also used quite frequently.

"Crummey Power" – A power held by a beneficiary of a trust to withdraw his or her representative share from the principal of a trust. This enables the grantor or settlor of the trust to take a corresponding amount of the gift tax "annual exclusion".

"Issue" – The child or children of the particular person referred to.

"Child" – Under New York law, for example, the term "child" is deemed to include both children of the blood and adopted children.

"Intestacy" – The phrase used to define the situation wherein a person dies without making a Will, or a person makes a Will, which cannot be probated. The assets of such person would be distributed pursuant to the laws of "intestacy" of the State where such person is domiciled, and the fiduciary who would be appointed by the Surrogate is called an "Administrator".

"Marital Right" – The statute provides that the surviving spouse of a decedent is entitled to a specific share of a decedent's estate, the amount of such share depending upon the other survivors of the decedent. In the event the

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testator does not make sufficient provisions in the Will and/or the non-probate assets received by the surviving spouse are less than the minimum amount prescribed by statute, then the surviving spouse may make an "election against the Will" and be entitled to the minimum statutory amount, irrespective of the Will terms.

"Infant" – Under New York law, a person under eighteen years of age is considered to be an "infant", and is also called a "minor". When an infant reaches the age of eighteen years, such person is deemed to have reached his or her "majority".

"Codicil" – A "codicil" is an amendment to a Will. A codicil must be executed in the same manner as the original Will, and upon the death of a testator, the original Will and the codicils thereto, are probated together and each must be respectively proved.

"Sibling" – Brothers and sisters descended from the same parent.

"Attestation" – The clause wherein the witnesses "attest" to the testator's execution of the Will. The law requires that certain procedures are followed regarding the execution of a Will, and to avoid questions with respect to the validity of a Will, the prescribed procedures should be followed closely. Any person who is named in the Will as a legatee, devisee or beneficiary should not be a witness to the Will's execution by the testator.

"Testamentary" – Arising from or relating to a Will. For example, all trusts created under the Will are called "Testamentary trusts" as differentiated from trusts created during the lifetime of a person.

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“Brother and Sister” – Half-brothers and half-sisters of a testator are entitled to share in a testamentary gift to be divided amongst his “brothers” and “sisters”.

“Cousin” – A “cousin” has been interpreted to mean “first cousin” only.

“Descendant” – The term “descendant” means only the issue of a deceased person, and does not describe the child of a living parent.

“Heir”, “Next of Kin”, “Distributee” – These terms and those of a like import all mean distributees under the laws of intestacy (the distribution of a decedent’s estate where he has no Will).

“Nephews and Nieces” – The terms “nephews” and “nieces”, in their primary and ordinary sense, do not include grand-nephews and grand-nieces or more remote descendants, unless there is something in the Will that the words were used in a broader sense.

“Wife/Husband” – A gift to a spouse is a gift to one who occupies that relationship. Divorce will terminate the bequest unless there exists clear language to the contrary (EPTL § 5-1.4).

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ADDITIONAL HEALTH CARE/ESTATE PLANNING TOOLS

°°° **"Living Will"** – A document which confirms that you do not wish to be kept alive by artificial means where there is not a likelihood of recovery to a meaningful life. A Living Will may contain organ donation wishes and directions regarding staying in a hospital or at home in the last days of one's life. Some states, unlike New York, for example, Missouri, Iowa, Kentucky, Connecticut and Maryland, have Living Will statutes.

°°° **"Health Care Proxy"** – A document which appoints an individual(s) as your agent(s) to carry out the health care wishes contained in a Living Will. Some practitioners combine a Living Will and a Health Care Proxy in the same instrument.

°°° **"Durable Power of Attorney"** – A document which delegates responsibility to another individual or individuals to make gifts, real estate and/or personal property transfers, access your accounts, etc. It should be made "Durable" if you wish it to remain effective in the event of disability. Powers of Attorney can be "Springing", i.e. take effect at a later date or effective immediately. A Power of Attorney is a powerful tool which ends at death. It can be revoked at any time. This instrument can avoid expensive and time-wasting conservatorship/guardianship proceedings.

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