

## Chapter 952

AN ACT in relation to estates, powers and trusts, constituting chapter 17-b of the consolidated laws

Became a law August 2, 1966, with the approval of the Governor. Passed by a majority vote, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

### **ESTATES, POWERS AND TRUSTS LAW**

- Article 1. General provisions. (§§ 1-1.1--1-2.20)
2. Rules governing dispositions subject to this law.  
(§§ 2-1.1--2-1.15)
3. Substantive law of wills. (§§ 3-1.1--3-6.9)
4. Descent and distribution of an intestate estate.  
(§§ 4-1.1--4-1.6)
5. Family rights. (§§ 5-1.1--5-4.6)
6. Classification, creation, definition of, and rules governing estates in property. (§§ 6-1.1--6-6.7)
7. Trusts. (§§ 7-1.1--7-8.1)
8. Charitable trusts. (§§ 8-1.1--8-1.9)
9. Perpetuities and accumulations. (§§ 9-1.1--9-2.3)
10. Powers. (§§ 10-1.1--10-10.8)
11. Fiduciaries: Powers, duties and limitations; actions by or against in representative or individual capacities.  
(§§ 11-1.1--11-4.7)
- 11-A. Uniform principal and income act. (§§ 11-A-1.1--11-A-6.4)
12. Actions by creditors and other persons against distributees and testamentary beneficiaries. (§§ 12-1.1--12-2.5)
13. Other provisions affecting estates. (§§ 13-1.1--13-4.12)
- 13-A. Administration of digital assets summary of article. (§§ 13-A-1--13-A-5.2)
14. Repealer; Derivation and Distribution Tables; Effective Date. (§§ 14-1.1--14-3.1)

### ARTICLE 1

#### **GENERAL PROVISIONS**

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**PART 1. SHORT TITLE; HOW CITED;  
REFERENCES; SEVERABILITY; APPLICATION**

**§ 1-1.1 Short title; how cited**

This chapter shall be known as the Estates, Powers and Trusts Law and

may be cited as EPTL. A section of this law may be cited by article, part and section number, to wit, EPTL 1-1.1, which refers to article 1, part 1, section 1, without being preceded by the word article, part or section or the symbol §.

## **§ 1-1.2 References**

Unless otherwise stated, all references in this chapter to article, part or section number refer to the articles, parts or section numbers of this chapter, and all references in any section of this chapter to a lettered or numbered paragraph or subparagraph refer to the paragraph or subparagraph so lettered or numbered in such section.

## **§ 1-1.3 Rules governing use of certain words**

In this chapter, unless the context otherwise requires:

(a) Words in the singular number include the plural, and in the plural include the singular.

(b) Words of the masculine gender include the feminine and the neuter, and when the sense so indicates words of the neuter gender may refer to any gender.

(c) The word "writing" includes typewritten or printed matter.

## **§ 1-1.4 Severability**

If any provision of this chapter or application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of this chapter which can be given effect without regard to the invalid provision or application, and to this end the provisions of this chapter are declared to be severable.

## **§ 1-1.5 Application**

Unless otherwise stated therein, the provisions of this chapter apply to the estates, and to instruments making dispositions or appointments thereof, of persons living on its effective date or born subsequent thereto, without regard to the date of execution of any such instrument; except that the provisions of this chapter shall not impair or defeat any rights which have accrued under dispositions or appointments in effect prior to its effective date.

## **PART 2. DEFINITIONS**

In this chapter, unless the context otherwise requires or a different meaning is expressly provided, the words and phrases set forth in this part shall be given their indicated meaning:

### **§ 1-2.1 Codicil**

A codicil is a supplement to a will, either adding to, taking from or altering its provisions or confirming it in whole or in part by republication, but not totally revoking such will.

### **§ 1-2.2 Creator**

A creator is a person who makes a disposition of property.

### **§ 1-2.3 Demonstrative disposition**

A demonstrative disposition is a testamentary disposition of property to be taken out of specified or identified property.

### **§ 1-2.4 Disposition**

A disposition is a transfer of property by a person during his lifetime or by will.

### **§ 1-2.5 Distributee**

A distributee is a person entitled to take or share in the property of a decedent under the statutes governing descent and distribution.

### **§ 1-2.6 Estate**

Depending upon the context, "estate" may mean:

- (a) The interest which a person has in property.
- (b) The aggregate of property which a person owns.

### **§ 1-2.7 Fiduciary**

A fiduciary is a person who meets the description, in this part, of a "personal representative" or who is designated by the creator or by the court to act as an assignee for the benefit of creditors, or a committee, conservator, curator, custodian, guardian, trustee or donee of a power during minority.

### **§ 1-2.8 General disposition**

A general disposition is a testamentary disposition of property not amounting to a demonstrative, residuary or specific disposition.

### **§ 1-2.9 Incompetent**

An incompetent is a person judicially declared to be incapable of managing his affairs.

#### **§ 1-2.9-a Infant or minor**

As used in this chapter, the term "infant" or "minor" means a person who has not attained the age of eighteen years, provided, however, that such definition shall not be applicable to any provision relating to the New York Uniform Transfers to Minors Act, nor to section 13-3.4.

#### **§ 1-2.10 Issue**

(a) Unless a contrary intention is indicated:

(1) Issue are the descendants in any degree from a common ancestor.

(2) The terms "issue" and "descendants", in subparagraph (1), include adopted children.

#### **§ 1-2.11 Per capita**

A disposition or distribution of property is per capita when it is made to persons, each of whom is to take in his own right an equal portion of such property.

#### **§ 1-2.12 Person**

The term "person" includes a natural person, an association, board, any corporation, whether municipal, stock or non-stock, court, governmental agency, authority or subdivision, partnership or other firm and the state.

#### **§ 1-2.13 Personal representative**

A personal representative is a person who has received letters to administer the estate of a decedent. The term does not include an assignee for the benefit of creditors, or a committee, conservator, curator, custodian, guardian, trustee or donee of a power during minority.

#### **§ 1-2.14 Per stirpes**

A per stirpes disposition or distribution of property is made to persons who take as issue of a deceased ancestor in the following manner:

The property so passing is divided into as many equal shares as there are (i) surviving issue in the generation nearest to the deceased ancestor which contains one or more surviving issue and (ii) deceased issue in the same generation who left surviving issue, if any. Each surviving member in such nearest generation is allocated one share. The share of a deceased issue in such nearest generation who left surviving issue shall be distributed in the same manner to such issue.

#### **§ 1-2.15 Property**

Property is anything that may be the subject of ownership, and is real or personal property.

#### **§ 1-2.16 Representation**

By representation means a disposition or distribution of property made in the following manner to persons who take as issue of a deceased ancestor:

The property so passing is divided into as many equal shares as there are (i) surviving issue in the generation nearest to the deceased ancestor which contains one or more surviving issue and (ii) deceased issue in the same generation who left surviving issue, if any. Each surviving member in such nearest generation is allocated one share. The remaining shares, if any, are combined and then divided in the same manner among the surviving issue of the deceased issue as if the surviving issue who are allocated a share had predeceased the decedent, without issue.

### **§ 1-2.17 Specific disposition.**

A specific disposition is a disposition of a specified or identified item of the testator's property.

### **§ 1-2.18 Testamentary beneficiary**

A testamentary beneficiary is a person in whose favor a disposition of property is made by will.

### **§ 1-2.19 Will**

\* (a) A will is an oral declaration or written instrument, made as prescribed by 3-2.1 or 3-2.2 to take effect upon death, whereby a person disposes of property or directs how it shall not be disposed of, disposes of his body or any part thereof, exercises a power, appoints a fiduciary or makes any other provision for the administration of his estate, and which is revocable during his lifetime.

\* NB Effective until December 12, 2027

\* (a) A will is a written instrument, oral declaration or electronic record, made as prescribed by 3-2.1, 3-2.2 or 3-6.6, respectively, to take effect upon death, whereby a person disposes of property or directs how it shall not be disposed of, disposes of their body or any part thereof, exercises a power, appoints a fiduciary or makes any other provision for the administration of their estate, and which is revocable during their lifetime.

\* NB Effective December 12, 2027

(b) Unless the context otherwise requires, the term "will" includes a "codicil".

### **§ 1-2.20 Lifetime trust**

The term "lifetime trust" shall mean an express trust and all

amendments thereto created other than by will and shall not include; a trust for the benefit of creditors, a resulting or constructive trust, a business trust where certificates of beneficial interest are issued to the beneficiary, an investment trust, voting trust, a security instrument such as a deed of trust and a mortgage, a trust created by the judgment or decree of a court, a liquidation or reorganization trust, a trust for the sole purpose of paying dividends, interest, interest coupons, salaries, wages, pensions or profits, instruments wherein persons are mere nominees for others, or a trust created in deposits in any banking institution or savings and loan institution.

## ARTICLE 2

### **RULES GOVERNING DISPOSITIONS SUBJECT TO THIS LAW**

#### **PART 1. SUBSTANTIVE RULES GOVERNING DISPOSITIONS**

Section 2-1.1 Heirs at law and next of kin defined.

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2-1.3 Adopted children and posthumous children as members of a class.

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## **PART 1. SUBSTANTIVE RULES GOVERNING DISPOSITIONS**

### **§ 2-1.1 Heirs at law and next of kin defined**

Whenever used in a statute or instrument, unless a contrary intention is expressed therein, the term "heirs", "heirs at law", "next of kin" or any term of like import means the distributees, as defined in 1-2.5.

### **§ 2-1.2 Issue to take per capita, per stirpes or by representation**

(a) Instruments executed prior to September first, nineteen hundred ninety-two. Whenever a disposition of property is made to "issue", such issue, if in equal degree of consanguinity to their common ancestor, take per capita, but if in unequal degree, per stirpes, unless a contrary intention is expressed.

(b) Instruments executed on or after September first, nineteen hundred ninety-two. Whenever a disposition of property is made to "issue", such issue take by representation as defined in 1-2.16, unless a contrary intention is expressed.

### **§ 2-1.3 Adopted children and posthumous children as members of a class**

(a) Unless the creator expresses a contrary intention, a disposition of property to persons described in any instrument as the issue, children, descendants, heirs, heirs at law, next of kin, distributees (or by any term of like import) of the creator or of another, includes:

(1) Adopted children and their issue in their adoptive relationship.

The rights of adopted children and their issue to receive a disposition under wills and lifetime instruments as a member of such class of persons based upon their birth relationship shall be governed by the provisions of subdivision two of section one hundred seventeen of the domestic relations law.

(2) Children conceived before, but born alive after such disposition becomes effective.

(3) Nonmarital children. For the purposes of this paragraph, a nonmarital child is the child of a mother and is the child of a father if the child is entitled to inherit from such father under section 4-1.2 of this chapter. The provisions of this paragraph shall apply to the wills of persons dying on and after September first, nineteen hundred ninety-one, to lifetime instruments theretofore executed which on said date are subject to the grantor's power to revoke or amend, and to all lifetime instruments executed on or after such date.

#### **§ 2-1.4 Words of inheritance unnecessary**

The word "heirs" or words of inheritance of like import are not necessary to create or dispose of a fee.

#### **§ 2-1.5 Advancements and their adjustment**

(a) An advancement is an irrevocable gift intended by the donor as an anticipatory distribution in complete or partial satisfaction of the interest of the donee in the donor's estate, either as distributee in intestacy or as beneficiary under an existing will of the donor.

(b) No advancement shall affect the distribution of the estate of the donor unless proved by a writing contemporaneous therewith signed by the donor evidencing his intention that the gift be treated as an advancement, or by the donee acknowledging that such was the intention.

(c) When so proved, the advancement is part of the estate of the donor for the purpose of distribution. If such advancement is equal to or greater than the interest of the donee, whether in intestacy or under the will, such donee or his successor in interest may not share in the distribution of the estate; but if less than such intestate share or

testamentary interest, the donee or his successor in interest may take his intestate share or testamentary interest reduced by the amount of the advancement.

(d) Unless otherwise provided in a writing contemporaneous with the advancement and signed by the donor:

(1) An advancement, made as provided in this section, may be adjusted out of the property of the donor in such manner as may be equitable.

(2) The advancement shall have the value at which it is appraised for estate tax purposes, or, if not included in the gross taxable estate of the donor, the value at which it would have been appraised if included therein.

(e) Nothing in this section shall increase or decrease the elective share of a surviving spouse under either 5-1.1 or 5-1.1-A except to the extent authorized by paragraph (b) of those sections.

#### **§ 2-1.6 Disposition of property where a person dies within one hundred twenty hours of another person or any other event**

(a) Except as provided in paragraph (b) of this section:

(1) Where, under articles 4 and 5 of this chapter, the title to property or the devolution of property depends upon an individual's survivorship of the death of another individual, an individual who is not established by clear and convincing evidence to have survived the other individual by one hundred twenty hours is deemed to have predeceased the other individual.

(2) For purposes of a provision of a governing instrument that relates to an individual surviving an event, including the death of another individual, an individual who is not established by clear and convincing evidence to have survived the event by one hundred twenty hours is deemed to have predeceased the event.

(3) Where a disposition of property under a governing instrument (i) depends upon the time of death of two or more beneficiaries designated to take alternatively by reason of surviving an event, including the death of another individual, and (ii) it is not established by clear and convincing evidence that such beneficiaries have survived the event by one hundred twenty hours, the property thus disposed of shall be divided into as many equal portions as there are alternative beneficiaries and

such portions shall be distributed respectively to those who would have taken the whole property in the event that the designated beneficiary through whom they take had survived.

(4) Where it is not established by clear and convincing evidence that one of two co-owners with right of survivorship survived the other co-owner by one hundred twenty hours, one-half of the property passes as if one had survived by one hundred twenty hours and one-half as if the other had survived by one hundred twenty hours. Where there are more than two co-owners and it is not established by clear and convincing evidence that at least one of them survived the others by one hundred twenty hours, the property passes in the proportion that one bears to the whole number of co-owners.

(b) The survival requirements of paragraph (a) of this section shall not apply if:

(1) The governing instrument contains language dealing explicitly with simultaneous deaths or deaths in a common disaster and that language is operable under the facts of the case.

(2) The governing instrument expressly indicates that an individual is not required to survive an event, including the death of another individual, by any specified period or expressly requires the individual to survive the event for a specified period. However, survival of the event or the specified period must be established by clear and convincing evidence.

(3) The imposition of a one hundred twenty-hour requirement of survival would cause a nonvested property interest or a power of appointment to be invalid under section 9-1.1 of this chapter. However, survival must be established by clear and convincing evidence.

(4) The application of a one hundred twenty-hour requirement of survival to multiple governing instruments would result in an unintended failure or duplication of a disposition. However, survival must be established by clear and convincing evidence.

(5) Its application would result in a taking of the intestate estate by the state.

(6) The surviving spouse exercised the right of election under section 5-1.1-A of this chapter, but died less than one hundred twenty hours after the death of the deceased spouse.

(c) For purposes of this section, "governing instrument" means a deed,

will, trust, insurance or annuity policy, bank account in trust form, security registration in beneficiary form (TOD), pension, profit-sharing, retirement, or similar benefit plan, instrument creating or exercising a power of appointment or a power of attorney, or a dispositive, appointive, or nominative instrument of any similar type.

**§ 2-1.7 Presumption of death from absence; effect of exposure to specific peril**

(a) A person who is absent for a continuous period of three years, during which, after diligent search, he or she has not been seen or heard of or from, and whose absence is not satisfactorily explained shall be presumed, in any action or proceeding involving any property of such person, contractual or property rights contingent upon his or her death or the administration of his or her estate, to have died three years after the date such unexplained absence commenced, or on such earlier date as clear and convincing evidence establishes is the most probable date of death.

(b) The fact that such person was exposed to a specific peril of death may be a sufficient basis for determining at any time after such exposure that he or she died less than three years after the date his or her absence commenced.

(c) The three-year period provided herein shall not apply in any case in which a different period has been prescribed by statute.

**§ 2-1.8 Apportionment of federal and state estate or other death taxes; fiduciary to collect taxes from property taxed and transferees thereof**

(a) Whenever it appears in any appropriate action or proceeding that a fiduciary has paid or may be required to pay an estate or other death tax, under the law of this state or of any other jurisdiction, with respect to any property required to be included in the gross tax estate of a decedent under the provisions of any such law (hereinafter called "the tax"), the amount of the tax, except in a case where a testator otherwise directs in his will, and except where by any instrument other than a will (hereinafter called a "non-testamentary instrument")

direction is given for apportionment within the fund of taxes assessed upon the specific fund dealt with in such non-testamentary instrument, shall be equitably apportioned among the persons interested in the gross tax estate, whether residents or non-residents of this state, to whom such property is disposed of or to whom any benefit therein accrues (hereinafter called "the persons benefited") in accordance with the rules of apportionment herein set forth, and the persons benefited shall contribute the amounts apportioned against them.

(b) Unless otherwise provided, when a disposition is made by which any person is given an interest in income or an estate for years or for life or other temporary interest in any property or fund, the tax apportionable against such temporary interest and the remainder limited thereon is chargeable against and payable out of the principal of such property or fund without apportionment between such temporary interest and remainder. The provisions of this paragraph apply although the holder of the temporary interest has rights in the principal, but do not apply to a common law annuity.

(c) Unless otherwise provided in the will or non-testamentary instrument, and subject to paragraph (d-1) of this section:

(1) The tax shall be apportioned among the persons benefited in the proportion that the value of the property or interest received by each such person benefited bears to the total value of the property and interest received by all persons benefited, the values as finally determined in the respective tax proceedings being the values to be used as the basis for apportionment of the respective taxes.

(2) Any exemption or deduction allowed under the law imposing the tax by reason of the relationship of any person to the decedent, the fact that the property consists of life insurance proceeds or the charitable purposes of the gift shall inure to the benefit of the person bearing such relationship or receiving such insurance proceeds or charitable gift, as the case may be.

(3) Any deduction for property previously taxed and any credit for gift taxes paid by the decedent shall inure to the benefit of all persons benefited and the tax to be apportioned shall be the tax after allowance of such deduction or credit.

(4) Any interest resulting from the late payment of the tax shall be apportioned in the same manner as the tax and shall be charged wholly to

principal.

(5) Any discount allowed for prepayment of the tax shall be credited wholly to the principal of the funds contributing the moneys used for prepayment in proportion to the contribution made.

(d) Subject to subparagraphs (1), (2) and (3) of this paragraph, any direction as to apportionment or non-apportionment of the tax, whether contained in a will or a non-testamentary instrument, relates only to the property passing thereunder, unless such will or instrument provides otherwise.

(1) Any such direction in a will which is later in date than a prior non-testamentary instrument and which contains a contrary direction shall govern provided that the later will specifically refers to the direction in such prior instrument.

(2) Any such direction in a non-testamentary instrument which is later in date than a prior will or non-testamentary instrument and which contains a contrary direction shall govern provided that the later instrument specifically refers to the direction in such prior will or instrument.

(3) Any such direction provided in a non-testamentary instrument only relates to the payment of the tax from the property passing thereunder and such direction shall not serve to exonerate such non-testamentary property from the payment of its proportionate share of the tax, even if otherwise directed in that non-testamentary instrument.

(d-1)(1)(A) If any part of the gross tax estate consists of property the value of which is includible in the gross tax estate by reason of §2044 of the Internal Revenue Code of 1986 as from time to time amended, the decedent's estate shall be entitled to recover from the person receiving the property the amount by which the total tax under article twenty-six of the tax law which has been paid exceeds the total tax under such article which would have been payable if the value of such property had not been included in the gross tax estate.

(B) Clause (A) of this subparagraph shall not apply if the decedent specifically directs otherwise by will.

(2) For the purposes of this paragraph, if there is more than one person receiving the property, the right of recovery shall be against each such person.

(3) In the case of penalties and interest attributable to additional

taxes described in subparagraph (1) of this paragraph, rules similar to subparagraphs (1) and (2) of this paragraph shall apply.

(e) In all cases in which any property required to be included in the gross tax estate does not come into the possession of the fiduciary, he is authorized to, and shall recover from the persons benefited or from any person in possession of such property the ratable amounts of the tax and any interest payable by the persons benefited. The surrogate may direct the payment thereof to the fiduciary and may charge such payments against the interests of the persons benefited in any assets in the possession of the fiduciary or any other person. If the fiduciary cannot recover the amount of the tax and interest apportioned against a person benefited, such amount may be charged in such manner as the surrogate determines.

(f) No fiduciary is required to pay over or distribute to any person other than the fiduciary charged with the duty to collect and pay the tax any fund or property with respect to which the tax is or may be imposed until the amount of the tax apportioned or which may be apportioned against such fund or property and any interest due from the persons entitled thereto is paid or, where the tax has not been determined or apportionment made, unless and until adequate security for such payment is furnished to the fiduciary making such payment or distribution.

(g) The surrogate shall make such preliminary, intermediate or final decrees or orders in the proceeding, as he shall deem advisable, tentatively or finally apportioning the tax and any interest, directing the fiduciary to collect the apportioned amounts from the property or interests in his possession of any persons against whom such apportionment has been made and directing all other persons against whom the tax and any interest are apportioned or from whom any part of the tax and any interest may be recovered to make payment of such apportioned amounts to such fiduciary; and if it is ascertained in such proceeding that the property in the possession of the fiduciary, otherwise payable to a person liable for any part of the tax and interest, is insufficient to discharge the liability of such person, the surrogate may direct that the balance of the apportioned amount due shall be paid to the fiduciary by such other person. If, in the course of the proceeding, it is ascertained that more than the ratable amount

of the tax and interest due from any person has been paid by him or in his behalf the surrogate may direct an appropriate reimbursement of the overpayment.

(h) If the surrogate apportions any part of the tax against any person interested in non-testamentary property or apportions the tax among the respective interests created by any non-testamentary instrument, he may, in his discretion, assess against such property or interests, an equitable share of the expense in connection with the determination of the tax and the apportionment thereof. Whenever an attorney renders services to the estate or to its personal representative resulting in the exclusion from the gross taxable estate of any non-testamentary property or interests created by any non-testamentary instrument, the surrogate may, in his discretion, assess against such property or interests an equitable share of the compensation for such legal services rendered to the estate or to its personal representative in proportion to the benefit received by such property or interests from such services, unless the decedent's will or the non-testamentary instrument contains a direction that no portion of the tax shall be apportioned against such non-testamentary property or against interests created by any non-testamentary instrument. The surrogate may retain jurisdiction of any proceeding until the purposes of this section have been accomplished.

#### **§ 2-1.9 Distributions in kind by executors and trustees**

(a) (1) As used in this section, the terms "pecuniary disposition" and "transfer in trust of a pecuniary amount" mean, respectively, a disposition by will or a transfer under a trust agreement of a specific amount of money, which amount is either expressly stated in the instrument or determinable by means of a formula which is stated in the instrument.

(2) Whether a testamentary disposition or transfer in trust is pecuniary or fractional in character depends upon the intention of the creator.

(b) Unless the instrument expressly provides otherwise:

(1) Where a will or a trust agreement authorizes the executor or trustee (hereinafter called the "fiduciary") to satisfy wholly or partly

in kind a pecuniary disposition or transfer in trust of a pecuniary amount, the assets selected by the fiduciary for that purpose shall be valued at their respective values on the dates of their distribution.

(2) Where a will or a trust agreement authorizes the fiduciary to satisfy wholly or partly in kind a pecuniary disposition or transfer in trust of a pecuniary amount and the instrument requires the fiduciary to value the assets selected by the fiduciary for such distribution as of a date other than the dates of their distribution, the assets selected by the fiduciary for that purpose, together with any cash distributed, shall have an aggregate value on the dates of their distribution amounting to no less than, and to the extent practicable no more than, the amount of such testamentary disposition or transfer in trust as stated in, or determined by the formula stated in, the instrument.

(c) This section applies to wills of decedents dying before, on or after its effective date and to trust agreements executed before, on or after such date, provided, however, that it shall not be applied so as to require repayment to the fiduciary of any distributions actually made prior to such date.

#### **§ 2-1.10 Provisions relating to infants and minors**

(a) Unless the creator expressly provides to the contrary, in any instrument executed prior to September first, nineteen hundred seventy-four, the words "minor", "minority", "infant", "infancy", "majority", "adult" and words of like import shall mean or refer to a person or a class of persons under the age of twenty-one years or who shall have reached such age, according to the context, and, unless otherwise expressly provided in any instrument executed on or after September first, nineteen hundred seventy-four shall mean or refer to a person or a class of persons under the age of eighteen years or who shall have reached such age, according to the context, except that any designation of a testamentary guardian of a "minor" or an "infant" shall refer to a guardianship of a person who has not reached the age of eighteen years, regardless of the date of the instrument containing the designation.

(b) This act shall not apply to distributions made subsequent to September first, nineteen hundred seventy-four and prior to the

effective date of this act.

### **§ 2-1.11 Renunciation of property interests**

(a) A renunciation made in compliance with the provisions of this section shall not necessarily constitute a qualified disclaimer within the meaning of section 2518 of the Internal Revenue Code of 1986, as amended, or for the purposes of the taxes imposed by article twenty-six of the tax law.

(b) For purposes of this section:

(1) The term "disposition" shall include a disposition created under a will or trust agreement including, without limitation, the granting of a power of appointment, a disposition created by the exercise or nonexercise of a power of appointment, a distributive share under 4-1.1, a transfer created by a trust account as defined in 7-5.1, a transfer created by a life insurance or annuity contract, a transfer resulting from the creation of a joint tenancy or tenancy by the entirety, succession to an interest occurring by operation of law on the death of a joint tenant or tenant by the entirety, a transfer under an employee benefit plan (including, without limitation, any pension, retirement, death benefit, stock bonus or profit-sharing plan, system or trust), a transfer of a security to a beneficiary pursuant to part 4 of article 13 of this chapter, any other disposition or transfer created by any testamentary or nontestamentary instrument, or by operation of law, and any of the foregoing created or increased by reason of a renunciation made by another person.

(2) The effective date of the disposition for purposes of this section shall be:

A. If the disposition is created by will, the exercise or nonexercise of a testamentary power of appointment, a distribution pursuant to 4-1.1, the deposit of money in a trust account as defined in 7-5.1, the registration of a security in beneficiary form pursuant to part 4 of article 13 of this chapter, a life insurance or annuity contract, the death of a joint tenant or tenant by the entirety, or an employee benefit plan, the date of death of the deceased testator, holder of the power of appointment, intestate, creator of the trust account,

registered owner of the security, insured, annuitant, other joint tenant or tenant by the entirety, or employee, as the case may be;

B. If the disposition is created by trust agreement, the exercise of a presently exercisable power of appointment, the creation of a joint tenancy or tenancy by the entirety, or the renunciation of a disposition created by another, the date as of which the transfer in trust is irrevocable and is a completed gift for federal gift tax purposes (regardless of whether a gift tax is imposed on the completed gift), the date of the exercise of the power of appointment, the creation of a joint tenancy or tenancy by the entirety, or renunciation, as the case may be; and

C. If the disposition is created by any other testamentary or nontestamentary instrument, or by operation of law, the date of the event by which the beneficiary is finally ascertained. Notwithstanding the foregoing, the effective date of a disposition which is of a future estate shall be the date on which it becomes an estate in possession.

(c) (1) Any beneficiary of a disposition may renounce all or part of such beneficiary's interest; provided, however, that a surviving joint tenant or tenant by the entirety may renounce the interest to which such tenant succeeds, by operation of law upon the death of another joint tenant or tenant by the entirety, to the extent such interest could be the subject of a qualified disclaimer under section 2518 of the United States Internal Revenue Code of 1986, as amended.

(2) Such renunciation shall be in writing, signed and acknowledged by the person renouncing, and shall be filed in the office of the clerk of the court having jurisdiction over the will or trust agreement governing the property of which the disposition would otherwise be made or the court which issued letters of administration, or if there is no probate or administration, then in a surrogate's court provided by law as the place of probate or administration of the decedent's estate, within nine months after the effective date of the disposition. Such renunciation shall be accompanied by an affidavit of the renouncing party that such party has not received and is not to receive any consideration in money or money's worth for such renunciation from a person or persons whose

interest is to be accelerated, unless payment of such consideration has been authorized by the court. Notice of such renunciation, which shall include a copy of the renunciation, shall be served personally or in such manner as the court may direct upon the fiduciary directed by the will or trust agreement to make the disposition or upon the administrator or such other person who was directed to make the disposition or upon any other person having custody or possession of or legal title to the property, an interest in which is being renounced, and by mail or in such manner as the court may direct upon all persons whose interest may be created or increased by reason of such renunciation. The time to file and serve such renunciation may be extended, in the discretion of the court, on a petition showing reasonable cause and on notice to such persons and in such manner as the court may direct. The time limited in this section for filing and serving such renunciation is exclusive, and shall not be suspended or otherwise affected by any other provision of law; such renunciation shall be effective as of the date of such filing, notwithstanding that notice thereof may thereafter be required by the court.

(d) A renunciation may be made by:

(1) The guardian of the property of an infant, when so authorized by the court having jurisdiction of the estate of the infant.

(2) The committee of an incompetent when so authorized by the court that appointed the committee.

(3) The conservator of a conservatee, when so authorized by the court that appointed the conservator.

(4) A guardian appointed under article eighty-one of the mental hygiene law, when so authorized by the court that appointed the guardian.

(5) The personal representative of a decedent, provided, however, that the personal representative may seek authorization from the court having jurisdiction of the estate of the decedent.

(6) An attorney-in-fact, when so authorized under a duly executed power of attorney, provided, however, that any renunciation by an attorney-in-fact of a person under disability shall not be effective unless it is further authorized by the court with which the renunciation must be filed under subparagraph two of paragraph (c) of this section, and provided, further, that a renunciation by an attorney-in-fact of a

person not under disability may be made without court authorization, unless the property which would have passed under said renunciation is, by reason of said renunciation, disposed of in favor of such attorney-in-fact or the spouse or issue of such attorney-in-fact, in which case such renunciation shall not be effective unless either (A) the instrument appointing such attorney-in-fact expressly authorizes a renunciation in favor of such attorney-in-fact or the spouse or issue of such attorney-in-fact, or (B) such renunciation has been authorized by the court with which the renunciation must be filed under subparagraph two of paragraph (c) of this section.

(e) Unless the creator of the disposition has otherwise provided, the filing of a renunciation, as provided in this section, has the same effect with respect to the renounced interest as though the renouncing person had predeceased the creator or the decedent or, if the renounced interest is a future estate, as though the renouncing person had died at the time of filing or just prior to its becoming an estate in possession, whichever is earlier in time, and shall have the effect of accelerating the possession and enjoyment of subsequent interests, but shall have no effect upon the vesting of a future estate which by the terms of the disposition is limited upon a preceding estate other than the renounced interest. If, pursuant to the preceding sentence, there would occur a per stirpes disposition of the renounced interest or a disposition or distribution of the renounced interest by representation, then solely for purposes of applying 1-2.14 or 1-2.16, as the case may be, the renouncing person shall be treated as having died on the same date as, but immediately after, the creator or decedent or, if the renounced interest is a future estate, as having died on the same date as, but immediately after, its becoming an estate in possession or, if the time of filing is earlier in time, on the same date as, but immediately after, such filing. Such renunciation is retroactive to the creation of the disposition. A person who has a present and a future interest in property and renounces the present interest in whole or in part shall be deemed to have renounced the future interest to the same extent.

(f) A beneficiary may accept one disposition and renounce another, may renounce a disposition in whole or in part, or with reference to specific amounts, parts, fractional shares or assets thereof.

Notwithstanding the provisions of paragraph (e) of this section, a renunciation by a surviving spouse of a decedent of a disposition created by said decedent shall not be deemed to be a renunciation by such spouse of all or any part of any other disposition to or in favor of such spouse, regardless of whether the property which would have passed under said renounced disposition is by reason of said renunciation disposed of to or in favor of such spouse. Unless a renouncing person has provided otherwise in his renunciation, the effect of a renunciation of a fractional part of a disposition is to renounce such fraction of all property to which the renouncing person is entitled under the disposition.

(g) A renunciation may not be made under this section with respect to any property which a renouncing person has accepted, except that an acceptance does not preclude a person from renouncing all or part of any property to which such person becomes entitled when another person renounces after such acceptance. For purposes of this paragraph, a person accepts an interest in property if such person voluntarily transfers or encumbers, or contracts to transfer or encumber all or part of such interest, or accepts delivery or payment of, or exercises control as beneficial owner over all or part thereof, or executes a written waiver of the right to renounce, or otherwise indicates acceptance of all or part of such interest. A written waiver of the right to renounce shall be binding on the person waiving and all parties claiming by, through or under such person.

(h) A renunciation filed under this section is irrevocable.

(i) This section shall not abridge the right of any beneficiary or any other person to assign, convey, release or renounce any property or interest therein arising under any other section of this chapter or other statute or under common law.

(j) Except as specifically provided in the trust instrument, the will, any other instrument creating the disposition, or in this section, this section shall apply to each disposition the effective date of which (as defined in this section) is on or after the effective date of this section, except that with respect to the renunciation of a future interest this section shall apply as well to dispositions created or increased prior to the effective date of this section.

## **§ 2-1.12 Credit shelter formula bequests**

If: (a) the decedent dies after January thirty-first, two thousand;  
and

(b) by reason of the death of the decedent property passes or is acquired from the decedent under a will executed or a trust created prior to February first, two thousand which contains a formula providing, in sum or substance, for a bequest of the maximum amount of property that can be sheltered from federal estate tax by reason of available credits against such tax; and

(c) such formula was not amended at any time after January thirty-first, two thousand and before the death of the decedent, then, unless the instrument containing such formula specifically provides that there are non-tax reasons for taking the federal credit for state death taxes into account, such formula shall be deemed not to include a reference to the federal credit for state death taxes.

## **§ 2-1.13 Certain formula clauses to be construed to refer to the federal estate and generation-skipping transfer tax laws applicable to estates of decedents dying after December thirty-first, two thousand nine and before January first, two thousand eleven**

(a)(1) If by reason of the death of a decedent property passes or is acquired under a beneficiary designation, a will or trust of a decedent who dies after December thirty-first, two thousand nine and before January first, two thousand eleven, that contains a bequest or other disposition based upon the amount of property that can be sheltered from federal estate tax by referring to the "unified credit", "estate tax exemption", "applicable exclusion amount", "applicable exemption amount", "applicable credit amount", "marital deduction", "maximum marital deduction", "unlimited marital deduction", "charitable deduction", "maximum charitable deduction" or similar words or phrases relating to the federal estate tax, or that measures a share of an estate or trust based on the amount that can pass free of federal estate taxes, or that is otherwise based on a similar provision of federal

estate tax then such beneficiary designation, will or trust shall be deemed to refer to the federal estate tax law as applied with respect to decedents dying in two thousand ten, regardless of whether an election is made not to have the federal estate tax apply to a particular estate.

(2) If by reason of the death of a decedent property passes or is acquired under a beneficiary designation, a will or trust of a decedent who dies after December thirty-first, two thousand nine and before January first, two thousand eleven, that contains a bequest or other disposition based upon the amount of property that can be sheltered from federal generation-skipping transfer tax by referring to the "generation-skipping transfer tax exemption", "GST exemption", "generation-skipping transfer tax", "GST tax" or similar words or phrases that measures a share of an estate or trust based on the amount that can pass free of federal generation-skipping transfer taxes, or that is otherwise based on a similar provision of federal generation-skipping transfer tax law, then such beneficiary designation, will or trust shall be deemed to refer to the federal generation-skipping transfer tax law in effect in two thousand ten, regardless of whether an election is made not to have the federal estate tax apply to a particular estate.

(3) This paragraph shall not apply to a beneficiary designation, will or trust that manifests an intent that a contrary rule shall apply.

(b) The executor, trustee or other interested person under a beneficiary designation, will or trust referred to in paragraph (a) of this section may bring a proceeding to determine whether the beneficiary designation, will or trust manifests a contrary intention within the meaning of subparagraph three of paragraph (a) of this section. In any such proceeding, extrinsic evidence may be admitted to establish the decedent's intent.

(c) Any proceeding described in paragraph (b) of this section must be commenced by the date which is (1) twenty-four months following the date of death of the decedent, testator or grantor or (2) six months following the day on which the chapter of the laws of two thousand eleven which amended this paragraph became a law, whichever date is later, and not at any time thereafter. Notwithstanding the foregoing, the time to commence such a proceeding may be extended, in the discretion of the court, on a petition showing reasonable cause and on

notice to such persons and in such manner as the court may direct.

**§ 2-1.14 Right to recover state estate and gift taxes where decedent retained interest**

(a)(1) If any part of the gross tax estate on which tax has been paid consists of the value of property included in the gross estate by reason of section two thousand thirty-six of the internal revenue code (relating to transfers with retained life estate), the decedent's estate shall be entitled to recover from the person receiving the property the amount which bears the same ratio to the total tax under this chapter which has been paid as

- (A) the value of such property bears to
- (B) the taxable estate.

(2) Paragraph one shall not apply if the decedent otherwise directs in a provision of his will (or a revocable trust) specifically referring to this section.

(b) For purposes of this section, if there is more than one person receiving the property, the right of recovery shall be against each such person.

(c) In the case of penalties and interest attributable to the additional taxes described in subsection (a) of this section, rules similar to the rules of subsections (a) and (b) of this section shall apply.

(d) No person shall be entitled to recover any amount by reason of this section from a trust to which section six hundred sixty-four of the internal revenue code applies (determined without regard to this section).

**§ 2-1.15 Consequences of partly ineffective dispositions of trust principal to two or more beneficiaries**

Whenever the remainder of a lifetime or testamentary trust passes, whether outright or in further trust, to two or more designated beneficiaries, and such remainder is ineffective in part and no effective alternative disposition has been made in the governing

instrument, such ineffective part shall pass to the other designated beneficiary or, if there are two or more other designated beneficiaries, to such beneficiaries in the proportions that their respective interests in such principal bear to the aggregate of the interests of such designated beneficiaries in such principal.

### ARTICLE 3

#### **SUBSTANTIVE LAW OF WILLS**

##### **PART 1. WHO MAY MAKE AND RECEIVE TESTAMENTARY DISPOSITIONS OF PROPERTY; WHAT PROPERTY MAY BE DISPOSED OF BY WILL**

Section 3-1.1 Who may make wills of, and exercise testamentary powers of appointment over property.

3-1.2 What property may be disposed of by will.

3-1.3 Who may receive testamentary dispositions of property; testamentary dispositions to unincorporated associations.

##### **PART 2. EXECUTION OF WILLS**

Section 3-2.1 Execution and attestation of wills; formal requirements.

3-2.2 Nuncupative and holographic wills.

##### **PART 3. RULES GOVERNING TESTAMENTARY DISPOSITIONS**

Section 3-3.1 What a testamentary disposition includes.

3-3.2 Competence of attesting witness who is beneficiary; application to nuncupative will.

3-3.3 Disposition to issue or brothers or sisters of testator not to lapse; application to class dispositions.

3-3.4 Consequences of partly ineffective testamentary dispositions of property to two or more residuary beneficiaries.

3-3.5 Conditions qualifying dispositions; conditions against contest; limitation thereon.

3-3.6 Encumbrances on property of decedent or on proceeds of insurance policy on life of decedent not chargeable against assets of decedent's estate.

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#### PART 4. REVOCATION OF WILLS AND RELATED SUBJECTS

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#### PART 5. RULES GOVERNING WILLS HAVING RELATION TO ANOTHER JURISDICTION

Section 3-5.1 Formal validity, intrinsic validity, effect, interpretation, revocation or alteration of testamentary dispositions of, and exercise of testamentary powers of appointment over property by wills having relation to another jurisdiction.

#### PART 6. ELECTRONIC WILLS

Section 3-6.1 Short title

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3-6.3 Law applicable to electronic will; principles of equity

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3-6.8 Electronic will attested and made self-proving at time of execution

3-6.9 Filing of an electronic will

#### **PART 1. WHO MAY MAKE AND RECEIVE TESTAMENTARY DISPOSITIONS OF PROPERTY; WHAT PROPERTY MAY BE DISPOSED OF BY WILL**

**§ 3-1.1 Who may make wills of, and exercise testamentary powers of appointment over property**

Every person eighteen years of age or over, of sound mind and memory, may by will dispose of real and personal property and exercise a power to appoint such property.

**§ 3-1.2 What property may be disposed of by will**

Every estate in property may be devised or bequeathed.

**§ 3-1.3 Who may receive testamentary dispositions of property;**

testamentary dispositions to unincorporated associations

(a) A testamentary disposition of property may be made to any person having capacity to acquire and hold such property.

(b) When a will disposes of property to an association which lacks capacity to receive such property by will because it is unincorporated and the association may become incorporated under the law of this state or of the jurisdiction in which it has its principal office, such disposition is valid despite the lack of capacity of the beneficiary if within three years after probate of the will such beneficiary becomes incorporated with capacity to take such disposition, subject to the following:

(1) This section does not limit the power of the court to give effect to the intention of the testator and to preserve dispositions for the use and benefit of unincorporated associations.

(2) In the case of a testamentary disposition of property to an unincorporated association in such manner that the estate may lawfully vest in such association, as provided in paragraph (b), at a future time, the estate shall be treated as immediately vested either in the trustee in whom any estate preceding such disposition is vested or, if there is no such precedent trust, in the personal representative of the decedent's estate as trustee, subject to any intermediate estate created

by the will. The trust herein created is subject to the direction and control of the surrogate's court as if it had been created by express provision in the will. If the association is incorporated and empowered to receive the disposition, the trustee shall transfer the property disposed of to the corporation so formed, but if the association is not incorporated, the trustee shall transfer the property to such persons as are entitled thereto.

(3) If a testamentary disposition to an association is made in such manner as to take effect upon the incorporation of such association, as provided in paragraph (b), and no disposition is made of the rents, profits or other income accruing prior to such incorporation, the will shall be construed as directing the trustee described in subparagraph (2) to receive the rents, profits or other income and to hold them for the benefit of the corporation when formed or, if such corporation is not formed within the time prescribed by paragraph (b), for the benefit of the persons entitled to the property upon the failure of such disposition.

(4) Notwithstanding any other law of this state governing (A) the purposes for which trusts may be created, (B) the rule against perpetuities or (C) the accumulation of income, a trust as provided in subparagraph (2) is valid.

(5) During the continuance of any trust authorized by subparagraph (2), the unincorporated association to which the disposition is made may enforce such trust, and any such association has capacity as such, despite the fact that it is not incorporated, to exercise such right and to take such proceedings as may be appropriate for the exercise or waiver of such right or, in the manner permitted by law for renunciation by a testamentary beneficiary, to renounce the disposition. In the event of any such renunciation, the trust provided for in subparagraph (2) shall terminate and the property, including accumulations, shall vest in the persons otherwise entitled thereto as if no such disposition had been made.

(6) This section does not limit the effectiveness of 8-1.1 with respect to a disposition to which that section applies.

## **PART 2. EXECUTION OF WILLS**

### **§ 3-2.1 Execution and attestation of wills; formal requirements**

(a) \* Except for nuncupative and holographic wills authorized by 3-2.2, every will must be in writing, and executed and attested in the following manner:

\* NB Effective until December 12, 2027

\* Except for nuncupative and holographic wills authorized by 3-2.2 and electronic wills authorized by part six of this article, every will must be in writing, and executed and attested in the following manner:

\* NB Effective December 12, 2027

(1) It shall be signed at the end thereof by the testator or, in the name of the testator, by another person in his presence and by his direction, subject to the following:

(A) The presence of any matter following the testator's signature, appearing on the will at the time of its execution, shall not invalidate such matter preceding the signature as appeared on the will at the time of its execution, except that such matter preceding the signature shall not be given effect, in the discretion of the surrogate, if it is so incomplete as not to be readily comprehensible without the aid of matter which follows the signature, or if to give effect to such matter preceding the signature would subvert the testator's general plan for the disposition and administration of his estate.

(B) No effect shall be given to any matter, other than the attestation clause, which follows the signature of the testator, or to any matter preceding such signature which was added subsequently to the execution of the will.

(C) Any person who signs the testator's name to the will, as provided in subparagraph (1), shall sign his own name and affix his residence address to the will but shall not be counted as one of the necessary attesting witnesses to the will. A will lacking the signature of the person signing the testator's name shall not be given effect; provided, however, the failure of the person signing the testator's name to affix his address shall not affect the validity of the will.

(2) The signature of the testator shall be affixed to the will in the presence of each of the attesting witnesses, or shall be acknowledged by the testator to each of them to have been affixed by him or by his

direction. The testator may either sign in the presence of, or acknowledge his signature to each attesting witness separately.

(3) The testator shall, at some time during the ceremony or ceremonies of execution and attestation, declare to each of the attesting witnesses that the instrument to which his signature has been affixed is his will.

(4) There shall be at least two attesting witnesses, who shall, within one thirty day period, both attest the testator's signature, as affixed or acknowledged in their presence, and at the request of the testator, sign their names and affix their residence addresses at the end of the will. There shall be a rebuttable presumption that the thirty day requirement of the preceding sentence has been fulfilled. The failure of a witness to affix his address shall not affect the validity of the will.

(b) The procedure for the execution and attestation of wills need not be followed in the precise order set forth in paragraph (a) so long as all the requisite formalities are observed during a period of time in which, satisfactorily to the surrogate, the ceremony or ceremonies of execution and attestation continue.

### **§ 3-2.2 Nuncupative and holographic wills**

(a) For the purposes of this section, and as used elsewhere in this chapter:

(1) A will is nuncupative when it is unwritten, and the making thereof by the testator and its provisions are clearly established by at least two witnesses.

(2) A will is holographic when it is written entirely in the handwriting of the testator, and is not executed and attested in accordance with the formalities prescribed by 3-2.1.

(b) A nuncupative or holographic will is valid only if made by:

(1) A member of the armed forces of the United States while in actual military or naval service during a war, declared or undeclared, or other armed conflict in which members of the armed forces are engaged.

(2) A person who serves with or accompanies an armed force engaged in actual military or naval service during such war or other armed conflict.

(3) A mariner while at sea.

(c) A will authorized by this section becomes invalid:

(1) If made by a member of the armed forces, upon the expiration of one year following his discharge from the armed forces.

(2) If made by a person who serves with or accompanies an armed force engaged in actual military or naval service, upon the expiration of one year from the time he has ceased serving with or accompanying such armed force.

(3) If made by a mariner while at sea, upon the expiration of three years from the time such will was made.

(d) If any person described in paragraph (c) lacks testamentary capacity at the expiration of the time limited therein for the validity of his will, such will shall continue to be valid until the expiration of one year from the time such person regains testamentary capacity.

(e) Nuncupative and holographic wills, as herein authorized, are subject to the provisions of this chapter to the extent that such provisions can be applied to such wills consistently with their character, or to the extent that any such provision expressly provides that it is applicable to such wills.

### **PART 3. RULES GOVERNING TESTAMENTARY DISPOSITIONS**

#### **§ 3-3.1 What a testamentary disposition includes**

Unless the will provides otherwise, a disposition by the testator of all his property passes all of the property he was entitled to dispose of at the time of his death.

#### **§ 3-3.2 Competence of attesting witness who is beneficiary; application to nuncupative will**

(a) An attesting witness to a will to whom a beneficial disposition or appointment of property is made is a competent witness and compellable to testify respecting the execution of such will as if no such disposition or appointment had been made, subject to the following:

(1) Any such disposition or appointment made to an attesting witness

is void unless there are, at the time of execution and attestation, at least two other attesting witnesses to the will who receive no beneficial disposition or appointment thereunder.

(2) Subject to subparagraph (1), any such disposition or appointment to an attesting witness is effective unless the will cannot be proved without the testimony of such witness, in which case the disposition or appointment is void.

(3) Any attesting witness whose disposition is void hereunder, who would be a distributee if the will were not established, is entitled to receive so much of his intestate share as does not exceed the value of the disposition made to him in the will, such share to be recovered as follows:

(A) In case the void disposition becomes part of the residuary disposition, from the residuary disposition only.

(B) In case the void disposition passes in intestacy, ratably from the distributees who succeed to such interest. For this purpose, the void disposition shall be distributed under 4-1.1 as though the attesting witness were not a distributee.

(b) The provisions of this section apply to witnesses to a nuncupative will authorized by 3-2.2.

### **§ 3-3.3 Disposition to issue or brothers or sisters of testator not to lapse; application to class dispositions**

(a) Unless the will whenever executed provides otherwise:

(1) Instruments executed prior to September first, nineteen hundred ninety-two. Whenever a testamentary disposition including a disposition of a future estate other than a future estate subject to a condition precedent of surviving the testator is made to a beneficiary who is one of the testator's issue or a brother or sister, and such beneficiary dies during the lifetime of the testator leaving issue surviving such testator, such disposition does not lapse but vests in such surviving issue, by representation.

(2) Instruments executed on or after September first, nineteen hundred ninety-two. Whenever a testamentary disposition including a disposition of a future estate other than a future estate subject to a condition precedent of surviving the testator is made to a beneficiary who is one

of the testator's issue or a brother or sister, and such beneficiary dies during the lifetime of the testator leaving issue surviving such testator, such disposition does not lapse but vests in such surviving issue, by representation.

(3) The provisions of subparagraphs (1) and (2) of this paragraph apply to a disposition made in the form of a class gift other than a disposition to "issue," "descendants," or a class described by language of similar import, as if the disposition were made to the beneficiaries by their individual names, except that no benefit shall be conferred hereunder upon the surviving issue of an ancestor who died before the execution of the will in which the disposition to the class was made.

(b) As used in this section, the terms "issue", "surviving issue" and "issue surviving" include adopted children and their issue to the extent they would be included in a disposition to "issue" under 2-1.3 and subdivision two of section one hundred seventeen of the domestic relations law, and nonmarital children; for this purpose, a nonmarital child is the child of his mother and is the child of his father if he is entitled to inherit from his father under 4-1.2.

#### **§ 3-3.4 Consequences of partly ineffective testamentary dispositions of property to two or more residuary beneficiaries**

Whenever a testamentary disposition of property to two or more residuary beneficiaries is ineffective in part, as of the date of the testator's death, and the provisions of 3-3.3 do not apply to such ineffective part of the residuary disposition nor has an alternative disposition thereof been made in the will, such ineffective part shall pass to and vest in the remaining residuary beneficiary or, if there are two or more remaining residuary beneficiaries, in such beneficiaries, ratably, in the proportions that their respective interests in the residuary estate bear to the aggregate of the interests of all remaining beneficiaries in such residuary estate.

#### **§ 3-3.5 Conditions qualifying dispositions; conditions against contest; limitations thereon**

(a) A condition qualifying a disposition of property is operative despite the failure of the testator to provide for an alternative gift to take effect upon the breach or non-occurrence of such condition.

(b) A condition, designed to prevent a disposition from taking effect in case the will is contested by the beneficiary, is operative despite the presence or absence of probable cause for such contest, subject to the following:

(1) Such a condition is not breached by a contest to establish that the will is a forgery or that it was revoked by a later will, provided that such contest is based on probable cause.

(2) An infant or incompetent may affirmatively oppose the probate of a will without forfeiting any benefit thereunder.

(3) The following conduct, singly or in the aggregate, shall not result in the forfeiture of any benefit under the will:

(A) The assertion of an objection to the jurisdiction of the court in which the will was offered for probate.

(B) The disclosure to any of the parties or to the court of any information relating to any document offered for probate as a last will, or relevant to the probate proceeding.

(C) A refusal or failure to join in a petition for the probate of a document as a last will, or to execute a consent to, or waiver of notice of a probate proceeding.

(D) The preliminary examination, under SCPA 1404, of a proponent's witnesses, the person who prepared the will, the nominated executors and the proponents in a probate proceeding and, upon application to the court based upon special circumstances, any person whose examination the court determines may provide information with respect to the validity of the will that is of substantial importance or relevance to a decision to file objections to the will.

(E) The institution of, or the joining or acquiescence in a proceeding for the construction of a will or any provision thereof.

**§ 3-3.6 Encumbrances on property of decedent or on proceeds of insurance policy on life of decedent not chargeable against assets of decedent's estate**

(a) Where any property, subject, at the time of decedent's death, to

any lien, security interest or other charge, including a lien for unpaid purchase money, is specifically disposed of by will or passes to a distributee, or where the proceeds of any policy of insurance on the life of the decedent are payable to a named beneficiary and such policy is subject to any lien, security interest or other charge, the personal representative is not responsible for the satisfaction of such encumbrance out of the property of the decedent's estate, except as provided in SCPA 1811, unless, in the case of a will, the testator has expressly or by necessary implication indicated otherwise. A general provision in the will for the payment of debts is not such an indication.

(b) Any such encumbrance is chargeable against the property of the decedent or the proceeds of a policy of insurance on the life of the decedent, subject thereto. Nothing in this section imposes upon a testamentary beneficiary, distributee or named insurance beneficiary any personal liability for the payment of the debt secured by such encumbrance.

(c) Where any lien, security interest or other charge encumbers:

(1) Property passing to two or more persons, the interest of each such person shall, only as between such persons, bear its proportionate share of the total encumbrance.

(2) Two or more properties, each such property shall, only as between the recipients thereof, bear its proportionate share of the total encumbrance.

### **§ 3-3.7 Testamentary disposition to trustee under, or in accordance with terms of existing inter vivos trust**

(a) A testator may by will dispose of or appoint all or any part of such testator's estate to a trustee of a trust, the terms of which are evidenced by a written instrument executed by the testator, the testator and some other person, or some other person, including a trust established for the receipt of the proceeds of an annuity or pure endowment contract, or of a thrift, savings, pension, retirement, death benefit, stock bonus, or profit-sharing plan or system or a funded or unfunded life, group life, industrial life or accident and health insurance trust (although the person establishing such trust has

reserved any or all rights of ownership of the insurance contracts), regardless of whether any assets have been transferred to the trust prior to the death of the testator; provided that the trust instrument is identified in the will and is executed by the person establishing the trust prior to or contemporaneously with the execution of the will and, unless such person is the sole trustee, by at least one trustee thereof prior to the death of the testator, in the manner required by the laws of this state for the recording of a conveyance of real property or, in lieu thereof, in the presence of two witnesses who shall affix their signatures to the trust instrument.

(b) The testamentary disposition or appointment is valid, even though:

(1) The trust instrument is amendable or revocable, or both, provided, however, that the disposition or appointment shall be given effect in accordance with the terms of the trust instrument, including an amendment thereto, as they appear in writing on the date of the testator's death and, where the testator so directs, including amendments to the trust instrument after his or her death, if the instrument evidencing such amendment is executed and acknowledged in the manner provided for in paragraph (b) of 7-1.17.

(2) The right is reserved in such trust instrument (A) to exercise any power over any property transferred to or held in the trust or (B) to direct during the lifetime of the person establishing the trust or any other person, the persons and organizations to whom or in whose behalf the income shall be paid or the principal distributed.

(3) The trust instrument or any amendment thereto was not executed and attested in accordance with the formalities prescribed by 3-2.1.

(c) The property so disposed of or appointed by will becomes a part of the trust to which it is given, and title thereto vests in the trustee to be administered and disposed of in accordance with the terms of the trust instrument.

(d) Any disposition or appointment to the trustee made by a testator who died prior to the effective date of this section, which would be invalid under the applicable law of this state pre-existing the effective date of this section, shall be construed to create a testamentary trust under and in accordance with the terms of the trust instrument which the testator originally intended should embrace the property disposed of or appointed, as such terms appear in such trust

instrument at the date of the testator's death.

(e) A revocation or termination of the trust before the death of the testator shall cause the disposition or appointment to fail, unless the testator has made an alternative disposition.

### **§ 3-3.8 Validity of a purchase of real property notwithstanding its disposition by will**

The title of a purchaser of real property, in good faith and for valuable consideration, from a distributee of a person who died owning such property shall not be affected by a testamentary disposition of such property by the decedent, unless within two years after the testator's death the will disposing of the property is admitted to probate. If, however, at the time of the testator's death, the devisee is either an infant, incompetent, imprisoned for a term less than life, without the state or if the will was concealed by one or more of the distributees of the decedent, the two year period prescribed herein does not commence until the expiration of one year from the time of the removal of such disability or the delivery of the will to the devisee or to the surrogate having jurisdiction to admit the will to probate.

### **§ 3-3.9 Testamentary direction to purchase annuities**

If a testator directs in his will the purchase of an annuity, the beneficiaries to whom the income thereof is to be paid may not elect to take the capital sum directed to be used for the purchase of such annuity in lieu thereof, unless the will expressly confers such right or except as the will expressly provides for the purchase of an assignable annuity. But nothing contained herein shall impair the right of election by a surviving spouse under 5-1.1 or 5-1.1-A.

## **PART 4. REVOCATION OF WILLS AND RELATED SUBJECTS**

### **§ 3-4.1 Revocation of wills; effect on codicils**

(a) Except as otherwise provided in this chapter, a revocation or alteration, if intended by the testator, may be effected in the following manner only:

(1) A will or any part thereof may be revoked or altered by:

(A) Another will.

(B) A writing of the testator clearly indicating an intention to effect such revocation or alteration, executed with the formalities prescribed by this article for the execution and attestation of a will.

(2) A will may be revoked by:

(A) An act of burning, tearing, cutting, cancellation, obliteration, or other mutilation or destruction performed by:

(i) The testator.

(ii) Another person, in the presence and by the direction of the testator; in which case, the fact that the will was so revoked in the presence and by the direction of the testator shall be proved by at least two witnesses, neither of whom shall be the person who performed the act of revocation.

(b) In addition to the methods set forth in paragraph (a), a will may be revoked or altered by a nuncupative or holographic declaration of revocation or alteration made in the circumstances prescribed by 3-2.2 by any person therein authorized to make a nuncupative or holographic will. Any such nuncupative declaration of revocation or alteration must be clearly established by at least two witnesses; any such holographic declaration, by an instrument written entirely in the handwriting of the testator, although not executed and attested in accordance with the formalities prescribed by this article for the execution and attestation of a will.

(c) The revocation of a will, as provided in this section, revokes all codicils thereto.

### **§ 3-4.2 Agreement to convey property previously disposed of by will not a revocation**

An agreement made by a testator to convey any property does not revoke a prior testamentary disposition of such property; but such property

passes under the will to the beneficiaries, subject to whatever rights were created by such agreement.

**§ 3-4.3 Revocatory effect of a conveyance, settlement or other act affecting property previously disposed of by will**

A conveyance, settlement or other act of a testator by which an estate in his property, previously disposed of by will, is altered but not wholly divested does not revoke such disposition, but the estate in the property that remains in the testator passes to the beneficiaries pursuant to the disposition. However, any such conveyance, settlement or other act of the testator which is wholly inconsistent with such previous testamentary disposition revokes it.

**§ 3-4.4 Conveyance of property of an incompetent or conservatee, previously disposed of specifically by will, not revocation or ademption**

In the case of a sale or other transfer by a committee or conservator, during the lifetime of its incompetent or conservatee, of any property which such incompetent or conservatee had previously disposed of specifically by will when he was competent or able to manage his own affairs, and no order had been entered setting aside the adjudication of incompetency at the time of such incompetent's death, or the conservatorship continued through the date of the conservatee's death, the beneficiary of such specific disposition becomes entitled to receive any remaining money or other property into which the proceeds from such sale or transfer may be traced.

**§ 3-4.5 Insurance proceeds from specific disposition not subject to ademption**

Where insurance proceeds from property which was the subject of a specific disposition are paid after the testator's death, such proceeds,

to the extent received by the personal representative, are payable by him to the beneficiary of such disposition; and such proceeds retain the character of a specific disposition for all other purposes, including 12-1.2 and 13-1.3.

**§ 3-4.6 Revocation or alteration of later will not to revive prior will or any provisions thereof**

(a) If after executing a will the testator executes a later will which revokes or alters the prior one, a revocation of the later will does not, of itself, revive the prior will or any provision thereof.

(b) A revival of a prior will or of one or more of its provisions may be effected by:

(1) The execution of a codicil which in terms incorporates by reference such prior will or one or more of its provisions.

(2) A writing declaring the revival of such prior will or of one or more of its provisions, which is executed and attested in accordance with the formalities prescribed by this article for the execution and attestation of a will.

(3) A republication of such prior will, whether to the original witnesses or to new witnesses, which shall require a re-execution and re-attestation of the prior will in accordance with the formalities prescribed by 3-2.1.

**PART 5. RULES GOVERNING WILLS HAVING RELATION TO ANOTHER JURISDICTION**

**§ 3-5.1 Formal validity, intrinsic validity, effect, interpretation, revocation or alteration of testamentary dispositions of, and exercise of testamentary powers of appointment over property by wills having relation to another jurisdiction**

(a) As used in this section:

(1) "Real property" means land or any estate in land, including leaseholds, fixtures and mortgages or other liens thereon.

(2) "Personal property" means any property other than real property,

including tangible and intangible things.

(3) "Formal validity" relates to the formalities prescribed by the law of a jurisdiction for the execution and attestation of a will.

(4) "Intrinsic validity" relates to the rules of substantive law by which a jurisdiction determines the legality of a testamentary disposition, including the general capacity of the testator.

(5) "Effect" relates to the legal consequences attributed under the law of a jurisdiction to a valid testamentary disposition.

(6) "Interpretation" relates to the procedure of applying the law of a jurisdiction to determine the meaning of language employed by the testator where his intention is not otherwise ascertainable.

(7) "Local law" means the law which the courts of a jurisdiction apply in adjudicating legal questions that have no relation to another jurisdiction.

(b) Subject to the other provisions of this section:

(1) The formal validity, intrinsic validity, effect, interpretation, revocation or alteration of a testamentary disposition of real property, and the manner in which such property descends when not disposed of by will, are determined by the law of the jurisdiction in which the land is situated.

(2) The intrinsic validity, effect, revocation or alteration of a testamentary disposition of personal property, and the manner in which such property devolves when not disposed of by will, are determined by the law of the jurisdiction in which the decedent was domiciled at death.

(c) A will disposing of personal property, wherever situated, or real property situated in this state, made within or without this state by a domiciliary or non-domiciliary thereof, is formally valid and admissible to probate in this state, if it is in writing and signed by the testator, and otherwise executed and attested in accordance with the local law of:

(1) This state;

(2) The jurisdiction in which the will was executed, at the time of execution; or

(3) The jurisdiction in which the testator was domiciled, either at the time of execution or of death.

(d) A testamentary disposition of personal property intrinsically

valid under the law of the jurisdiction in which the testator was domiciled at the time the will was executed shall not be affected by a subsequent change in the domicile of the testator to a jurisdiction by the law of which the disposition is intrinsically invalid.

(e) Interpretation of a testamentary disposition of personal property shall be made in accordance with the local law of the jurisdiction in which the testator was domiciled at the time the will was executed.

(f) Whether a testamentary disposition of personal property is effectively revoked or altered by the provisions of a subsequent testamentary instrument or by a physical act to or upon the will by which the testamentary disposition was made is determined by the law of the jurisdiction in which the testator was domiciled at the time the subsequent instrument was executed or the physical act performed.

(g) Subject to paragraphs (d), (e) and (f), the intrinsic validity, effect, revocation or alteration of a testamentary disposition by which a power of appointment over personal property is exercised, and the question of whether such power has been exercised at all, are determined by:

(1) In the case of a presently exercisable general power of appointment, the law of the jurisdiction in which the donee of such power was domiciled at the time of death.

(2) In the case of a general power of appointment exercisable by will alone or a special power of appointment:

(A) If such power was created by will, the law of the jurisdiction in which the donor of the power was domiciled at the time of death.

(B) If such power was created by inter vivos disposition, the law of the jurisdiction which the donor of the power intended to govern such disposition.

(C) If the donor is himself the donee of a general power of appointment exercisable by will alone, the law of the jurisdiction in which the donor of the power was domiciled at the time of death.

(3) The formal validity of a will by which any power of appointment over personal property is exercised is determined in accordance with paragraph (c) on the basis that the testator referred to therein is the donee of such power.

(h) Whenever a testator, not domiciled in this state at the time of death, provides in his will that he elects to have the disposition of

his property situated in this state governed by the laws of this state, the intrinsic validity, including the testator's general capacity, effect, interpretation, revocation or alteration of any such disposition is determined by the local law of this state. The formal validity of the will, in such case, is determined in accordance with paragraph (c).

(i) Notwithstanding the definition of "real property" in subparagraph (a) (1), whether an estate in, leasehold of, fixture, mortgage or other lien on land is real property governed by subparagraph (b) (1) or personal property governed by subparagraph (b) (2) is determined by the local law of the jurisdiction in which the land is situated.

## **\* PART 6. ELECTRONIC WILLS**

Section 3-6.1 Short title

3-6.2 Definitions

3-6.3 Law applicable to electronic will; principles of equity

3-6.4 Choice of law regarding execution

3-6.5 Caution to testator

3-6.6 Execution of electronic will

3-6.7 Revocation

3-6.8 Electronic will attested and made self-proving at time of execution

3-6.9 Filing of an electronic will

\* NB Effective December 12, 2027

### **\* § 3-6.1 Short title**

This part may be cited as the New York electronic wills act.

\* NB Effective December 12, 2027

### **\* § 3-6.2 Definitions**

For purposes of this part the following terms shall have the following meanings:

(a) "Audit trail data" means data about the activities of data,

including but not limited to the electronic will's creation and execution.

(b) "Communication technology" means an electric device or process that allows two or more remotely located individuals to communicate with each other simultaneously by sight and sound.

(c) "Electronic" shall have the same meaning set forth in subdivision one of section three hundred two of the state technology law.

(d) "Electronic presence" means the relationship of two or more individuals in different locations communicating in real time using communication technology to the same extent as if the individuals were physically present in the same location.

(e) "Electronic will" means a will executed electronically in compliance with paragraphs (a) and (b) of section 3-6.6 and subsequently filed with the New York state unified court system in accordance with section 3-6.9.

(f) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(g) "Sign", with respect to an electronic record, means, with present intent to authenticate or adopt a record to affix to or logically associate with the record an electronic symbol or process.

(h) "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States. The term shall also include a federally recognized Indian tribe.

(i) "Will" has the same meaning as in section 1-2.19.

\* NB Effective December 12, 2027

### **\* § 3-6.3 Law applicable to electronic will; principles of equity**

An electronic will is a will for all purposes of the law of this state. The law of this state applicable to wills and principles of equity apply to an electronic will, except as modified by this act.

\* NB Effective December 12, 2027

**\* § 3-6.4 Choice of law regarding execution**

A will executed electronically but not in compliance with paragraph (a) of section 3-6.6 is an electronic will under this act and is formally valid and admissible to probate if executed in compliance with the law of the jurisdiction where the testator is:

- (a) physically located when the will is executed; or
- (b) domiciled when the will is executed or when the testator dies.

\* NB Effective December 12, 2027

**\* § 3-6.5 Caution to the testator**

An electronic will shall include a disclosure substantially similar to the following in twelve-point font or larger, boldface, double-spaced type:

CAUTION TO THE TESTATOR: YOUR WILL IS AN IMPORTANT DOCUMENT. AS TESTATOR, YOUR WILL SHOULD REFLECT YOUR FINAL WISHES. TO BE VALID, IT MUST BE SIGNED BY YOU OR ANOTHER INDIVIDUAL AUTHORIZED BY YOU AND WHO IS IN YOUR PHYSICAL PRESENCE AT THE TIME OF SIGNING. IT MUST ALSO BE SIGNED AT YOUR REQUEST BY AT LEAST TWO INDIVIDUALS, EACH OF WHOM IS A DOMICILIARY OF A STATE, AND EACH OF WHOM SIGNS THE WILL WITHIN A THIRTY DAY PERIOD AFTER WITNESSING YOU SIGN THE WILL OR ACKNOWLEDGE THAT YOU SIGNED IT IN EACH OF THEIR PHYSICAL OR ELECTRONIC PRESENCES.

WITHIN THIRTY DAYS AFTER THE ELECTRONIC WILL IS EXECUTED, IT MUST BE ELECTRONICALLY FILED WITH THE NEW YORK STATE UNIFIED COURT SYSTEM.

YOU MAY REVOKE YOUR ELECTRONIC WILL AT ANY TIME. YOU MAY DO SO BY EXECUTING A SUBSEQUENT WILL OR SEPARATE WRITING CLEARLY INDICATING YOUR INTENT TO REVOKE ALL OR PART OF YOUR ELECTRONIC WILL, OR BY REQUESTING ITS REMOVAL FROM THE NEW YORK STATE UNIFIED COURT SYSTEM. ONCE YOU HAVE REMOVED YOUR ELECTRONIC WILL FROM THE NEW YORK STATE UNIFIED COURT SYSTEM, IT IS REVOKED.

\* NB Effective December 12, 2027

**\* § 3-6.6 Execution of electronic will**

(a) Subject to paragraph (d) of section 3-6.8, an electronic will must be:

(1) a record that is readable as text at the time of signing under subparagraph two;

(2) signed at the end thereof by:

(A) the testator; or

(B) another individual in the testator's name, in the testator's physical presence and by the testator's direction, in a manner consistent with section 3-2.1 (a)(1)(C), subject to the following:

(i) The presence of any matter following the testator's signature, appearing on the will at the time of its execution, shall not invalidate such matter preceding the signature as appeared on the will at the time of its execution, except that such matter preceding the signature shall not be given effect, in the discretion of the surrogate, if it is so incomplete as not to be readily comprehensible without the aid of matter which follows the signature, or if to give effect to such matter preceding this signature would subvert the testator's general plan for the disposition and administration of their estate.

(ii) No effect shall be given to any matter, other than the attestation clause, which follows the signature of the testator, or to any matter preceding such signature which was added subsequently to the execution of the will;

(3) declared by the testator to each of the attesting witnesses in their physical or electronic presence that the instrument the testator has signed is the testator's will; and

(4) signed at the request of the testator by at least two individuals, each of whom is a domiciliary of a state and within a thirty day period after witnessing:

(A) the signing of the will under subparagraph two; or

(B) the testator's acknowledgment of the signing of the will under subparagraph two or acknowledgment of the will.

(b) An electronic will must be created and stored using technology that reliably evidences to a person inspecting the electronic record:

(1) The authenticity of the testator's signing of the electronic

record;

(2) The identity of that electronic record with the electronic record attested by the witnesses;

(3) All additions, deletions, or other alterations of the electronic record after signing by the testator; and

(4) Audit trail data.

(c) Intent of a testator that the record under subparagraph one of paragraph (a) of this section be the testator's electronic will may be established by extrinsic evidence.

\* NB Effective December 12, 2027

### **\* § 3-6.7 Revocation**

(a) An electronic will may revoke all or part of a previous will.

(b) An electronic will is revoked by:

(1) a subsequent will that revokes all or part of the electronic will;

(2) removal of the electronic will from the custody of the New York state unified court system by:

(i) the testator;

(ii) another person duly authorized by the testator as proved by at least two witnesses, neither of whom shall be the person removing the electronic will; or

(iii) as otherwise authorized by the uniform rules of the surrogate's court; or

(3) a writing of the testator clearly indicating an intention to effect such a revocation or alteration, executed with the formalities prescribed by this article for the execution and attestation of a will.

(c) An electronic will may be removed from the custody of the New York state court system by order of a court of competent jurisdiction which, if occurring during the lifetime of the testator, shall not be deemed a revocation of the electronic will.

\* NB Effective December 12, 2027

### **\* § 3-6.8 Electronic will attested and made self-proving at time of execution**

(a) An electronic will may be simultaneously executed, attested, and

made self-proving by acknowledgment of the testator and affidavits of the witnesses.

(b) The acknowledgment and affidavits under paragraph (a) must be:

(1) made before and in the physical or electronic presence of an officer authorized to administer oaths under law of the state in which the officer is located; and

(2) evidenced by the officer's certificate under official seal affixed to or logically associated with the electronic will.

(c) The acknowledgment and affidavits under paragraph (a) must conform with section fourteen hundred six of the surrogate's court procedure act and must indicate that the will was signed electronically.

(d) A signature physically or electronically affixed to an affidavit that is affixed to or logically associated with an electronic will under this act is deemed a signature of the electronic will under paragraph (a) of section 3-6.6.

(e) The existence of contemporaneously executed affidavits in electronic format executed in compliance with the applicable law governing electronic notaries or other such officers duly authorized to administer oaths electronically that satisfy paragraphs (a), (b) and (c) of this section shall create a rebuttable presumption that the electronic will was created in compliance with paragraph (b) of section 3-6.6.

\* NB Effective December 12, 2027

### **\* § 3-6.9 Filing of electronic will**

Within thirty days of its execution, an electronic will with audit trail data shall be electronically filed with the New York state unified court system either by the testator or another person duly authorized by the testator. The electronic will shall remain in the custody of the New York state unified court system until such time as it is removed or revoked in accordance with section 3-6.7. The failure to timely file an electronic will with the New York state unified court system shall result in the unfiled electronic will being deemed invalid.

\* NB Effective December 12, 2027

## ARTICLE 4

### **DESCENT AND DISTRIBUTION OF AN INTESTATE ESTATE**

#### **PART 1. RULES GOVERNING INTESTATE SUCCESSION**

Section 4-1.1 Descent and distribution of a decedent's estate.

4-1.2 Inheritance by non-marital children.

4-1.3 Inheritance by children conceived after the death of an intended parent.

4-1.4 Disqualification of parent to take intestate share.

4-1.5 Other disqualifications.

4-1.6 Disqualification of joint tenant in certain instances.

#### **PART 1. RULES GOVERNING INTESTATE SUCCESSION**

##### **§ 4-1.1 Descent and distribution of a decedent's estate**

The property of a decedent not disposed of by will shall be distributed as provided in this section. In computing said distribution, debts, administration expenses and reasonable funeral expenses shall be deducted but all estate taxes shall be disregarded, except that nothing contained herein relieves a distributee from contributing to all such taxes the amounts apportioned against him or her under 2-1.8.

Distribution shall then be as follows:

(a) If a decedent is survived by:

(1) A spouse and issue, fifty thousand dollars and one-half of the residue to the spouse, and the balance thereof to the issue by representation.

(2) A spouse and no issue, the whole to the spouse.

(3) Issue and no spouse, the whole to the issue, by representation.

(4) One or both parents, and no spouse and no issue, the whole to the surviving parent or parents.

(5) Issue of parents, and no spouse, issue or parent, the whole to the issue of the parents, by representation.

(6) One or more grandparents or the issue of grandparents (as hereinafter defined), and no spouse, issue, parent or issue of parents,

one-half to the surviving grandparent or grandparents of one parental side, or if neither of them survives the decedent, to their issue, by representation, and the other one-half to the surviving grandparent or grandparents of the other parental side, or if neither of them survives the decedent, to their issue, by representation; provided that if the decedent was not survived by a grandparent or grandparents on one side or by the issue of such grandparents, the whole to the surviving grandparent or grandparents on the other side, or if neither of them survives the decedent, to their issue, by representation, in the same manner as the one-half. For the purposes of this subparagraph, issue of grandparents shall not include issue more remote than grandchildren of such grandparents.

(7) Great-grandchildren of grandparents, and no spouse, issue, parent, issue of parents, grandparent, children of grandparents or grandchildren of grandparents, one-half to the great-grandchildren of the grandparents of one parental side, per capita, and the other one-half to the great-grandchildren of the grandparents of the other parental side, per capita; provided that if the decedent was not survived by great-grandchildren of grandparents on one side, the whole to the great-grandchildren of grandparents on the other side, in the same manner as the one-half.

(b) For all purposes of this section, decedent's relatives of the half blood shall be treated as if they were relatives of the whole blood.

(c) Distributees of the decedent, conceived before his or her death but born alive thereafter, take as if they were born in his or her lifetime.

(d) The right of an adopted child to take a distributive share and the right of succession to the estate of an adopted child continue as provided in the domestic relations law.

(e) A distributive share passing to a surviving spouse under this section is in lieu of any right of dower to which such spouse may be entitled.

#### **§ 4-1.2 Inheritance by non-marital children**

(a) For the purposes of this article:

(1) A non-marital child is the legitimate child of his mother so that

he and his issue inherit from his mother and from his maternal kindred.

(2) A non-marital child is the legitimate child of his father or non-gestating intended parent so that he and his issue inherit from such parent and such parent's kindred if:

(A) a court of competent jurisdiction has, during the lifetime of the father, made an order of filiation or parentage declaring parentage or the parentage of the child has been established through the execution of an acknowledgment of parentage pursuant to section four thousand one hundred thirty-five-b of the public health law, which has been filed with the registrar of the district in which the birth certificate has been filed or;

(B) the father of the child has signed an instrument acknowledging parentage, provided that

(i) such instrument is acknowledged or executed or proved in the form required to entitle a deed to be recorded in the presence of one or more witnesses and acknowledged by such witness or witnesses, in either case, before a notary public or other officer authorized to take proof of deeds and

(ii) such instrument is filed within sixty days from the making thereof with the putative father registry established by the state department of social services pursuant to section three hundred seventy-two-c of the social services law, as added by chapter six hundred sixty-five of the laws of nineteen hundred seventy-six and

(iii) the department of social services shall, within seven days of the filing of the instrument, send written notice by registered mail to the mother and other legal guardian of such child, notifying them that an acknowledgment of parentage instrument acknowledged or executed by such parent has been duly filed or;

(C) parentage has been established by clear and convincing evidence, which may include, but is not limited to: (i) evidence derived from a genetic marker test, or (ii) evidence that the parent openly and notoriously acknowledged the child as his or her own, however nothing in this section regarding genetic marker tests shall be construed to expand or limit the current application of subdivision four of section forty-two hundred ten of the public health law.

(3) The existence of an agreement obligating the father to support the non-marital child does not qualify such child or his issue to inherit

from the father in the absence of an order of filiation made or acknowledgement of parentage as prescribed by subparagraph (2).

(4) A motion for relief from an order of filiation may be made only by the father and a motion for relief from an acknowledgement of parentage may be made by a parent or other legal guardian of such child, or the child, provided however, such motion must be made within one year from the entry of such order or from the date of written notice as provided for in subparagraph (2).

(b) If a non-marital child dies, his or her surviving spouse, issue, mother, maternal kindred, father and paternal kindred inherit and are entitled to letters of administration as if the decedent was a marital child, provided that the father and paternal kindred may inherit or obtain such letters only if the parentage of the non-marital child has been established pursuant to any of the provisions of subparagraph (2) of paragraph (a).

#### **§ 4-1.3 Inheritance by children conceived after the death of an intended parent**

(a) When used in this article, unless the context or subject matter manifestly requires a different interpretation:

(1) "Genetic material" shall mean sperm or ova provided by a genetic parent.

(2) "Child" shall mean a child conceived through assisted reproduction.

(3) "Intended parent" shall have the same meaning as defined in section 581-102 of the family court act.

(b) For purposes of this article, a genetic child is the child of his or her intended parent or parents and, notwithstanding paragraph (c) of section 4-1.1 of this part, is a distributee of his or her intended parent or parents and, notwithstanding subparagraph (2) of paragraph (a) of section 2-1.3 of this chapter, is included in any disposition of property to persons described in any instrument of which an intended parent of the genetic child was the creator as the issue, children, descendants, heirs, heirs at law, next of kin, distributees (or by any term of like import) of the creator if it is established that:

(1) the intended parent in a written instrument executed pursuant to

the provisions of this section not more than seven years before the death of the intended parent expressly consented that if assisted reproduction were to occur after the death of the intended parent, the deceased individual would be a parent of the child; and

(2) the child was in utero no later than twenty-four months after the intended parent's death or born no later than thirty-three months after the intended parent's death.

(c) If the child was conceived using the genetic material of the intended parent, it must further be established that:

(1) the intended parent in a written instrument executed pursuant to the provisions of this section not more than seven years before the death of the intended parent authorized a person to make decisions about the use of the intended parent's genetic material after the death of the intended parent;

(2) the person authorized in the written instrument to make decisions about the use of the intended parent's genetic material gave written notice, by certified mail, return receipt requested, or by personal delivery, that the intended parent's genetic material was available for the purpose of conceiving a child of the intended parent, and such written notice was given;

(A) within seven months from the date of the issuance of letters testamentary or of administration on the estate of the intended parent, as the case may be, to the person to whom such letters have issued, or, if no letters have been issued within four months of the death of the intended parent, and

(B) within seven months of the death of the intended parent to a distributee of the intended parent; and

(3) the person authorized in the written instrument to make decisions about the use of the intended parent's genetic material recorded the written instrument within seven months of the intended parent's death in the office of the surrogate granting letters on the intended parent's estate, or, if no such letters have been granted, in the office of the surrogate having jurisdiction to grant them.

(d) The written instrument referred to in subparagraph (1) of paragraph (b) of this section and subparagraph (1) of paragraph (c) of this section:

(1) must be signed by the intended parent in the presence of two

witnesses who also sign the instrument referred to in subparagraph (1) of paragraph (c) of this section, both of whom are at least eighteen years of age and neither of whom is a person authorized under the instrument to make decisions about the use of the intended parent's genetic material;

(2) may be revoked only by a written instrument signed by the intended parent and executed in the same manner as the instrument it revokes;

(3) may not be altered or revoked by a provision in the will of the intended parent;

(4) an instrument referred to in subparagraph (1) of paragraph (c) of this section may authorize an alternate to make decisions about the use of the intended parent's genetic material if the first person so designated dies before the intended parent or is unable to exercise the authority granted;

(5) an instrument referred to in subparagraph (1) of paragraph (b) of this section may be substantially in the following form and must be signed and dated by the intended parent and properly witnessed:

I, \_\_\_\_\_,

(Your name and address)

consent to the use of assisted reproduction to conceive a child or children of mine after my death. I understand that, unless I revoke this consent and authorization in a written document signed by me in the presence of two witnesses who also sign the document, this consent and authorization will remain in effect for seven years from this day and that I cannot revoke or modify this consent and designation by any provision in my will.

Signed this        day of        ,

\_\_\_\_\_  
(Your signature)

Statement of witnesses:

I declare that the person who signed this document is personally known to me and appears to be of sound mind and acting willingly and free from duress. He or she signed this document in my presence. I am not the person authorized in this document to control the use of the genetic material of the person who signed this document.

Witness:

Address:

Date:

Witness:

Address:

Date:

(6) may be substantially in the following form and must be signed and dated by the intended parent and properly witnessed:

I, \_\_\_\_\_,  
(Your name and address)

consent to the use of my (sperm or ova) (referred to below as my "genetic material") to conceive a child or children of mine after my death, and I authorize

\_\_\_\_\_  
(Name and address of person)

to decide whether and how my genetic material is to be used to conceive a child or children of mine after my death. In the event that the person authorized above dies before me or is unable to exercise the authority granted I designate

\_\_\_\_\_  
(Name and address of person)

to decide whether and how my genetic material is to be used to conceive a child or children of mine after my death. I understand that, unless I revoke this consent and authorization in a written document signed by me in the presence of two witnesses who also sign the document, this consent and authorization will remain in effect for seven years from this day and that I cannot revoke or modify this consent and designation by any provision in my will.

Signed this            day of            ,

\_\_\_\_\_  
(Your signature)

Statement of witnesses:

I declare that the person who signed this document is personally known to me and appears to be of sound mind and acting willingly and free from duress. He or she signed this document in my presence. I am not the person authorized in this document to control the use of the genetic material of the person who signed this document.

Witness:

Address:

Date:

Witness:

Address:

Date:

(e) Any authority granted in a written instrument authorized by this section to a person who is the spouse of the intended parent at the time of execution of the written instrument is revoked by a final decree or judgment of divorce or annulment, or a final decree, judgment or order declaring the nullity of the marriage between the intended parent and the spouse or dissolving such marriage on the ground of absence, recognized as valid under the law of this state, or a final decree or judgment of separation, recognized as valid under the law of this state, which was rendered against the spouse.

(f) Process shall not issue to a child who is a distributee of an intended parent under sections one thousand three and one thousand four hundred three of the surrogate's court procedure act unless the child is in being at the time process issues.

(g) Except as provided in paragraph (b) of this section with regard to any disposition of property in any instrument of which the intended parent of a child is the creator, for purposes of section 2-1.3 of this chapter a child who is entitled to inherit from an intended parent under this section is a child of the intended parent for purposes of a disposition of property to persons described in any instrument as the issue, children, descendants, heirs, heirs at law, next of kin, distributees (or by any term of like import) of the creator or of another. This paragraph shall apply to the wills of persons dying on or after September first, two thousand fourteen, to lifetime instruments theretofore executed which on said date are subject to the grantor's power to revoke or amend, and to all lifetime instruments executed on or after such date.

(h) For purposes of section 3-3.3 of this chapter the terms "issue", "surviving issue" and "issue surviving" include a child if he or she is entitled to inherit from his or her intended parent under this section.

(i) Where the validity of a disposition under the rule against perpetuities depends on the ability of a person to have a child at some future time, the possibility that such person may have a child conceived using assisted reproduction shall be disregarded. This provision shall

not apply for any purpose other than that of determining the validity of a disposition under the rule against perpetuities where such validity depends on the ability of a person to have a child at some future time. A determination of validity or invalidity of a disposition under the rule against perpetuities by the application of this provision shall not be affected by the later birth of a child conceived using assisted reproduction disregarded under this provision.

(j) The use of a genetic material after the death of the person providing such material is subject exclusively to the provisions of this section and to any valid and binding contractual agreement between such person and the facility providing storage of the genetic material and may not be the subject of a disposition in an instrument created by the person providing such material or by any other person.

#### **§ 4-1.4 Disqualification of parent to take intestate share**

(a) No distributive share in the estate of a deceased child shall be allowed to a parent if the parent, while such child is under the age of twenty-one years:

(1) has failed or refused to provide for the child or has abandoned such child, whether or not such child dies before having attained the age of twenty-one years, unless the parental relationship and duties are subsequently resumed and continue until the death of the child; or

(2) has been the subject of a proceeding pursuant to section three hundred eighty-four-b of the social services law which:

(A) resulted in an order terminating parental rights, or

(B) resulted in an order suspending judgment, in which event the surrogate's court shall make a determination disqualifying the parent on the grounds adjudicated by the family court, if the surrogate's court finds, by a preponderance of the evidence, that the parent, during the period of suspension, failed to comply with the family court order to restore the parent-child relationship.

(b) Subject to the provisions of subdivision eight of section two hundred thirteen of the civil practice law and rules, the provisions of subparagraph one of paragraph (a) of this section shall not apply to a biological parent who places the child for adoption based upon:

(1) a fraudulent promise, not kept, to arrange for and complete the

adoption of such child, or

(2) other fraud or deceit by the person or agency where, before the death of the child, the person or agency fails to arrange for the adoptive placement or petition for the adoption of the child, and fails to comply timely with conditions imposed by the court for the adoption to proceed.

(c) In the event that a parent or spouse is disqualified from taking a distributive share in the estate of a decedent under this section or 5-1.2, the estate of such decedent shall be distributed in accordance with 4-1.1 as though such spouse or parent had predeceased the decedent.

#### **§ 4-1.5 Other disqualifications**

No estate property, whether passing by intestacy or otherwise, which has its situs in this state, shall pass to any other state or territory of the United States, or to any foreign country or sovereignty in the event of the absence of an individual heir, distributee, legatee or owner of said property, but shall pass as abandoned property to the state of New York, and shall be held as such property pursuant to the abandoned property law.

#### **§ 4-1.6 Disqualification of joint tenant in certain instances**

Notwithstanding any other provision of law to the contrary, a joint tenant convicted of murder in the second degree as defined in section 125.25 of the penal law or murder in the first degree as defined in section 125.27 of the penal law of another joint tenant shall not be entitled to the distribution of any monies in a joint bank account created or contributed to by the deceased joint tenant, except for those monies contributed by the convicted joint tenant.

Upon the conviction of such joint tenant of first or second degree murder and upon application by the prosecuting attorney, the court, as part of its sentence, shall issue an order directing the amount of any joint bank account to be distributed pursuant to the provisions of this

section from the convicted joint tenant and to the deceased joint tenant's estate. The court and the prosecuting attorney shall each have the power to subpoena records of a banking institution to determine the amount of money in such bank account and by whom deposits were made. The court shall also have the power to freeze such account upon application by the prosecuting attorney during the pendency of a trial for first or second degree murder. If, upon receipt of such court orders described in this section, the banking institution holding monies in such joint account complies with the terms of the order, such banking institution shall be held free from all liability for the distribution of such funds as were in such joint account. In the absence of actual or constructive notice of such order, the banking institution holding monies in such account shall be held harmless for distributing the money according to its ordinary course of business.

For purposes of this section, the term banking institution shall have the same meaning as provided for in paragraph (b) of subdivision three of section nine-f of the banking law.

## ARTICLE 5

### FAMILY RIGHTS

#### PART 1. RIGHTS OF SURVIVING SPOUSE

- Section 5-1.1 Right of election by surviving spouse.
- 5-1.1-A Right of election by surviving spouse.
- 5-1.2 Disqualification as surviving spouse.
- 5-1.3 Revocatory effect of marriage after execution of will.
- 5-1.4 Revocatory effect of divorce, annulment or declaration of nullity, or dissolution of marriage on disposition, appointment, provision, or nomination regarding a former spouse.

#### PART 3. RIGHTS OF FAMILY UNIT

- Section 5-3.1 Exemption for benefit of family.
- 5-3.2 Revocatory effect of birth of child after execution of will.
- 5-3.4 Action in supreme court by child born after execution of will, by surviving spouse upon revocation of will by

marriage or by subscribing witness with interest under will.

PART 4. RIGHTS OF MEMBERS OF FAMILY RESULTING FROM WRONGFUL ACT,  
NEGLECT OR DEFAULT CAUSING DEATH OF DECEDENT

Section 5-4.1 Action by personal representative for wrongful act,  
neglect or default causing death of decedent.

5-4.2 Trial and burden of proof of contributory negligence.

5-4.3 Amount of recovery.

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5-4.5 Non-marital children.

5-4.6 Application to compromise action.

**PART 1. RIGHTS OF SURVIVING SPOUSE**

**§ 5-1.1 Right of election by surviving spouse**

(a) Election by surviving spouse against will executed after August thirty-first, nineteen hundred thirty and prior to September first, nineteen hundred sixty-six.

(1) Where a testator executes a will after August thirty-first, nineteen hundred thirty but prior to September first, nineteen hundred sixty-six, and is survived by a spouse, a personal right of election is given to the surviving spouse to take a share of the decedent's estate, subject to the following:

(A) For the purposes of this section, the elective share of the surviving spouse is one-third of the net estate if the decedent is survived by one or more issue and, in all other cases, one-half of such net estate. In computing the net estate, debts, administration and reasonable funeral expenses shall be deducted but all estate taxes shall be disregarded, except that nothing contained herein relieves the surviving spouse from contributing to all such taxes the amounts apportioned against him under 2-1.8.

(B) Where the elective share is over twenty-five hundred dollars and the testator has made a testamentary disposition in trust of an amount equal to or greater than the elective share, with income therefrom payable to the surviving spouse for life, the surviving spouse has the

limited right to elect to take the sum of twenty-five hundred dollars absolutely, which shall be deducted from the principal of such trust and the terms of the will remain otherwise effective.

(C) Where the elective share of the surviving spouse does not exceed twenty-five hundred dollars, the surviving spouse has the right to elect to take his elective share absolutely, which shall be in lieu of any provision for his benefit in the will.

(D) Where the will contains an absolute disposition to the surviving spouse of or in excess of the sum of twenty-five hundred dollars and also a disposition in trust with income payable to such spouse for life of an amount equal to or greater than the difference between the absolute disposition and his elective share, the surviving spouse has no right of election.

(E) Where the will contains an absolute disposition to the surviving spouse of an amount less than the sum of twenty-five hundred dollars and also a disposition in trust with income payable to such spouse for life of an amount equal to or greater than the difference between the absolute disposition and his elective share, the surviving spouse has the limited right to elect to take the sum of twenty-five hundred dollars, inclusive of the amount of such absolute disposition, and the difference between such disposition and the sum of twenty-five hundred dollars shall be deducted from the principal of such trust and the terms of the will remain otherwise effective.

(F) Where the aggregate of the provisions in the will for the surviving spouse, including the principal of a trust, an absolute disposition or any other kind of testamentary disposition is less than the elective share, the surviving spouse has the limited right to elect to take the difference between such aggregate and the amount of the elective share, and the terms of the will remain otherwise effective. In every estate, the surviving spouse has the limited right to withdraw the sum of twenty-five hundred dollars if the elective share is equal to or greater than that amount. Such sum, however, is inclusive of any absolute disposition, whether general or specific. Where a trust is created for the life of the surviving spouse, such sum of twenty-five hundred dollars or any lesser amount necessary to make up that sum is payable from the principal of such trust.

(G) The provisions of this paragraph with respect to trusts with

income payable for the life of the surviving spouse likewise apply to a legal life estate, to an annuity for life or to any other disposition in the will by which income is payable for the life of the surviving spouse. In computing the value of the dispositions in the will, the capital value of the fund or other property producing the income shall be taken and not the value of the life estate.

(H) The grant of authority in a will to a fiduciary or his successor (i) to act without bond, (ii) to name his successor to act without bond, (iii) to sell assets of the estate upon terms fixed by him, (iv) to invest the funds of the estate in other than legal investments, (v) to retain in the assets of the estate investments or property owned by the testator in his lifetime, (vi) to make distribution in kind, (vii) to make a binding and conclusive valuation of assets for the purpose of their distribution, (viii) to allocate assets either outright or in trust for the life of a surviving spouse or (ix) to conduct the affairs of the estate with partial or total exoneration from the legal responsibility of a fiduciary, shall not, either singly or in the aggregate, give the surviving spouse an absolute right to take his elective share; but the surrogate's court having jurisdiction of the estate, notwithstanding the terms of the will, may, in its discretion, in an appropriate proceeding by the surviving spouse or upon an accounting, direct and enforce for the protection of the surviving spouse an equitable distribution, allocation or valuation of the assets, enforce the liability of a fiduciary under the law and make such other directions, consistent with the provisions and purposes of this paragraph, as it may consider necessary for the protection of the surviving spouse.

(b) Inter vivos dispositions treated as testamentary substitutes for the purpose of election by surviving spouse.

(1) Where a person dies after August thirty-first, nineteen hundred sixty-six and is survived by a spouse who exercises a right of election under paragraph (c), the following transactions effected by such decedent at any time after the date of the marriage and after August thirty-first, nineteen hundred sixty-six, whether benefiting the surviving spouse or any other person, shall be treated as testamentary substitutes and the capital value thereof, as of the decedent's death, included in the net estate subject to the surviving spouse's elective

right:

(A) Gifts causa mortis.

(B) Money deposited, after August thirty-first, nineteen hundred sixty-six, together with all dividends credited thereon, in a savings account in the name of the decedent in trust for another person, with a banking organization, savings and loan association, foreign banking corporation or organization or bank or savings and loan association organized under the laws of the United States, and remaining on deposit at the date of the decedent's death.

(C) Money deposited, after August thirty-first, nineteen hundred sixty-six, together with all dividends credited thereon, in the name of the decedent and another person and payable on death, pursuant to the terms of the deposit or by operation of law, to the survivor, with a banking organization, savings and loan association, foreign banking corporation or organization or bank or savings and loan association organized under the laws of the United States, and remaining on deposit at the date of the decedent's death.

(D) Any disposition of property made by the decedent after August thirty-first, nineteen hundred sixty-six whereby property is held, at the date of his death, by the decedent and another person as joint tenants with a right of survivorship or as tenants by the entirety.

(E) Any disposition of property made by the decedent after August thirty-first, nineteen hundred sixty-six, in trust or otherwise, to the extent that the decedent at the date of his death retained, either alone or in conjunction with another person, by the express provisions of the disposing instrument, a power to revoke such disposition or a power to consume, invade or dispose of the principal thereof. The provisions of this paragraph shall not affect the right of any income beneficiary to the income undistributed or accrued at the date of death.

(2) Nothing in this paragraph shall affect, impair or defeat the right of any person entitled to receive (A) payment in money, securities or other property under a thrift, savings, pension, retirement, death benefit, stock bonus or profit-sharing plan, system or trust, (B) money payable by an insurance company or a savings bank authorized to conduct the business of life insurance under an annuity or pure endowment contract, a policy of life, group life, industrial life or accident and health insurance or a contract by such insurer relating to the payment

of proceeds or avails thereof or (C) payment of any United States savings bond payable to a designated person, and such transactions are not testamentary substitutes within the meaning of this paragraph.

(3) Transactions described in subparagraphs (C) or (D) shall be treated as testamentary substitutes in the proportion that the funds on deposit were the property of the decedent immediately before the deposit or the consideration for the property held as joint tenants or as tenants by the entirety was furnished by the decedent. The surviving spouse shall have the burden of establishing the proportion of the decedent's contribution. Where the other party to a transaction described in subparagraphs (C) or (D) is a surviving spouse, such spouse shall have the burden of establishing the proportion of his contribution, if any. For the purpose of this subparagraph, the surrogate's court may accept such evidence as is relevant and competent, whether or not the person offering such evidence would otherwise be competent to testify.

(4) The provisions of this paragraph shall not prevent a corporation or other person from paying or transferring any funds or property to a person otherwise entitled thereto, unless there has been served personally upon such corporation or other person a certified copy of an order enjoining such payment or transfer made by the surrogate's court having jurisdiction of the decedent's estate or by another court of competent jurisdiction. Such order may be made, on notice to such persons and in such manner as the court may direct, upon application of the surviving spouse or any other interested party and on proof that the surviving spouse has exercised his right of election under paragraph (c). Service of a certified copy of such order on the corporation or other person holding such fund or property shall be a defense to it, during the effective period of the order, in any action or proceeding brought against it which involves such fund or property.

(5) This paragraph shall not impair or defeat the rights of creditors of the decedent with respect to any matter as to which any such creditor has rights.

(6) In case of a conflict between this paragraph and any other provision of law affecting the transactions described in subparagraph (1), this paragraph controls.

(c) Election by surviving spouse against wills executed and

testamentary provisions made after August thirty-first, nineteen hundred sixty-six; election where decedent dies intestate as to all or any part of his estate.

(1) Where, after August thirty-first, nineteen hundred sixty-six, a testator executes a will disposing of his entire estate, and is survived by a spouse, a personal right of election is given to the surviving spouse to take a share of the decedent's estate, subject to the following:

(A) For the purposes of this paragraph, the decedent's estate includes the capital value, as of the decedent's death, of any property described in subparagraph (b) (1).

(B) The elective share, as used in this paragraph, is one-third of the net estate if the decedent is survived by one or more issue and, in all other cases, one-half of such net estate. In computing the net estate, debts, administration and reasonable funeral expenses shall be deducted but all estate taxes shall be disregarded, except that nothing contained herein relieves the surviving spouse from contributing to all such taxes the amounts apportioned against him under 2-1.8.

(C) The term "testamentary provision", as used in this paragraph, includes, in addition to dispositions made by the decedent's will, any transaction described as a testamentary substitute in subparagraph (b) (1).

(D) Where the elective share is over ten thousand dollars and the decedent has by testamentary provision created a trust in an amount equal to or greater than the elective share, with income therefrom payable to the surviving spouse for life, the surviving spouse has the limited right to elect to take the sum of ten thousand dollars absolutely, which shall be deducted from the principal of such trust and the terms of the instrument making the testamentary provision remain otherwise effective.

(E) Where the elective share of the surviving spouse does not exceed ten thousand dollars, the surviving spouse has the right to take the elective share absolutely, in lieu of any testamentary provision for his benefit.

(F) Where an absolute testamentary provision is made for the surviving spouse of or in excess of ten thousand dollars, and also a provision in trust with income payable to such spouse for life of an amount equal to

or greater than the difference between such absolute testamentary provision and his elective share, the surviving spouse has no right of election.

(G) Where an absolute testamentary provision is made for the surviving spouse in an amount less than ten thousand dollars, and also a testamentary provision in trust with income payable to such spouse for life of an amount equal to or greater than the difference between such absolute testamentary provision and his elective share, the surviving spouse has the limited right to take the sum of ten thousand dollars, inclusive of the amount of such absolute testamentary provision, and the difference between such absolute testamentary provision and the sum of ten thousand dollars shall be deducted from the principal of the trust and the terms of the instrument making the testamentary provision remain otherwise effective.

(H) Where the aggregate of the testamentary provisions for the surviving spouse, including the principal of a trust, an absolute testamentary provision or any other kind of testamentary provision, is less than the elective share, the surviving spouse has the limited right to elect to take the difference between such aggregate and the amount of the elective share, and the terms of the instrument making such testamentary provisions remain otherwise effective. In every estate, the surviving spouse has the limited right to withdraw the sum of ten thousand dollars if the elective share is equal to or greater than that amount. Such sum, however, is inclusive of any absolute testamentary provision. Where a trust is created with income payable to the surviving spouse for life, such sum of ten thousand dollars or any lesser amount necessary to make up that sum is payable from the principal of such trust.

(I) The provisions of this paragraph with respect to trusts for the life of the surviving spouse also apply to a legal life estate, to an annuity for the life of the surviving spouse, to an annuity trust and a unitrust as provided in subparagraph (K) of paragraph one of this subdivision or to any other testamentary provision by which income is payable for the life of the surviving spouse. In computing the value of the testamentary provisions the capital value of the fund or other property producing the income shall be taken and not the value of the life estate.

(J) The surviving spouse is entitled to take the capital value (in no case to exceed such spouse's elective share) of the fund or other property producing the income whenever any instrument making a testamentary provision of income for his life authorizes:

(i) The reduction of any trust, legal life estate or annuity by invasion of the principal for another person.

(ii) The termination of any trust, legal life estate or annuity prior to the death of the surviving spouse by payment of the principal thereof to another person.

(iii) The fiduciary to pay or apply to the use of the surviving spouse less than substantially all of the net income from any trust, legal life estate or annuity.

If an instrument making any such testamentary provision contains grants of authority to a fiduciary other than the foregoing, the surrogate's court having jurisdiction of the decedent's estate may, in its discretion, in an appropriate proceeding by the surviving spouse or upon an accounting, direct and enforce for the protection of the surviving spouse an equitable distribution, allocation or valuation of the assets, enjoin any fiduciary, whether appointed by will or otherwise, from exercising any power, statutory or otherwise, which would be prejudicial to the interests of the surviving spouse, enforce the liability of a fiduciary under the law and make such other directions, consistent with the provisions and purposes of this paragraph, as it may consider necessary for the protection of the surviving spouse.

(K) If any testamentary provision for the surviving spouse provides that such spouse shall receive, for life and not less often than annually, from a charitable remainder annuity trust, as defined in paragraph one of subdivision (d) of section six hundred sixty-four of the United States Internal Revenue Code, a sum certain (which is not less than five percent of the initial net fair market value of all property placed in such trust) or from a charitable remainder unitrust, as defined in paragraph two of subdivision (d) of section six hundred sixty-four of such code, a fixed percentage (which is not less than five percent) of the net fair market value of its assets, valued annually, such testamentary provisions shall satisfy the provisions of this

paragraph with respect to trusts with income payable to the surviving spouse for life.

(2) Where, after August thirty-first, nineteen hundred sixty-six, a person dies intestate as to all or any part of his estate, and, in the case of part intestacy, executes a will after such date, and is survived by a spouse, a personal right of election is given to the surviving spouse to take a share of the testamentary provisions made by the decedent, as such provisions are defined in subparagraph (1) (C), subject to the following:

(A) The share of the testamentary provisions to which the surviving spouse is entitled hereunder is his elective share, as defined in subparagraphs (1) (A) and (B), reduced by the capital value of all property passing to such spouse (i) in intestacy under 4-1.1, (ii) by testamentary substitute as described in subparagraph (b) (1) and (iii) by disposition under the decedent's last will.

(B) The satisfaction of such elective share shall not reduce the intestate share of any other distributee of the decedent.

(C) Whenever a testamentary provision for the surviving spouse takes the form of income payable for his life:

(i) The surviving spouse has the limited right to elect to take, absolutely, the sum of ten thousand dollars or the share to which he is entitled hereunder, whichever is less. Such sum, however, is inclusive of any absolute testamentary provision, as described in subparagraph (1) (C), and any amount to which the surviving spouse is entitled in intestacy under 4-1.1, and is payable from the principal of any trust, legal life estate or annuity created by such testamentary provision, the terms of which remain otherwise effective.

(ii) The provisions of subparagraph (1) (J) apply.

(d) General provisions governing right of election.

(1) Where an election has been made under this section, the will or other instrument making a testamentary provision, as the case may be, is valid as to the residue after the share to which the surviving spouse is entitled has been deducted, and the terms of such will or instrument remain otherwise effective so far as possible.

(2) Whenever a will creates a trust, legal life estate or annuity for the benefit of the surviving spouse for life, and such will commands, directs, authorizes or permits the fiduciary to allocate, apportion or

charge receipts or expenses to principal or income in such manner as will or might deprive the spouse of income as defined in section 11-2.1 of this act or in any other law applicable to such trust, legal life estate or annuity, and where such trust, legal life estate or annuity, but for such will provision would satisfy the elective share of the spouse in whole or in part, such command, direction, authorization or permission shall not of itself give the surviving spouse an absolute right to take his elective share. The surrogate's court having jurisdiction of the decedent's estate may, in any appropriate proceeding, direct and enforce for the protection of the surviving spouse an allocation, apportionment or charge of all receipts and expenses in accordance with applicable legal or equitable principles so as to assure such surviving spouse of all or substantially all of the income of such trust, legal life estate or annuity consistent with the purposes and provisions of this section. The court may enjoin any fiduciary from exercising any power; authority or permission or doing any act which would be prejudicial to the rights and interests of such surviving spouse under this section. The court may enforce the liability of a fiduciary under the law and make such directions, consistent with the purposes and provisions of this section, as it may consider necessary for the protection of the surviving spouse.

(3) Except as otherwise expressly provided in the will or other instrument making a testamentary provision, ratable contribution to the share to which the surviving spouse is entitled shall be made by the beneficiaries (including the recipients of any such testamentary provision), other than the surviving spouse, under:

(A) In the case of an election under paragraph (a), the decedent's will.

(B) In the case of an election under paragraph (c), the decedent's will and other instruments making testamentary provisions.

(4) The right of election is personal to the surviving spouse, except that an election may be made by:

(A) The guardian of the property of an infant spouse, when so authorized by the surrogate having jurisdiction of the decedent's estate.

(B) The committee of an incompetent spouse, when so authorized by the supreme court.

(C) The conservator of conservatee spouse, when so authorized by the supreme court.

(5) Any question arising as to the right of election shall be determined by the surrogate's court having jurisdiction of the decedent's estate in a proceeding brought for that purpose on notice to all interested persons in such manner as the court may direct, or in a proceeding for the judicial settlement of the accounts of the personal representative.

(6) Upon application by a surviving spouse who has made an election under this section, the surrogate may make an order cancelling such election, provided that no adverse rights have intervened and no prejudice is shown to creditors of such spouse or other persons interested in the estate. Such application shall be made on notice to such persons and in such manner as the court may direct. A certified copy of such order shall be indexed and recorded in the same manner as a notice of pendency of an action in the office of the clerk of the county in which any real property of the decedent is situated.

(7) The right of election granted by this section is not available to the spouse of a decedent who was not domiciled in this state at the time of death, unless such decedent elects, under paragraph (h) of 3-5.1, to have the disposition of his property situated in this state governed by the laws of this state.

(8) The decedent's estate shall include all property of the decedent, wherever situated.

(9) An election made by the surviving spouse under this section is in lieu of any right of dower to which such spouse may be entitled.

(e) Procedure for exercise of right of election.

(1) An election under this section must be made within six months from the date of issuance of letters testamentary or of administration, as the case may be. Written notice of such election shall be served upon any personal representative in the manner herein provided, or upon a person named as executor in a will on file in the surrogate's court in a case where such will has not yet been admitted to probate, and the original thereof shall be filed and recorded, with proof of service, in the surrogate's court in which such letters were issued within six months from the date of the issuance of letters. Such notice may be served by mailing a copy thereof, addressed to any personal

representative, or to the nominated executor, as the case may be, at the place of residence stated in the designation required by SCPA 708 or in such other manner as the surrogate may direct.

(2) The time to make such election may be extended before its expiration by an order of the surrogate's court from which such letters issued for a further period not exceeding six months upon any one application. If a spouse defaults in filing such election within six months from the date of issuance of such letters, the surrogate's court may relieve the spouse from such default and authorize the making of an election within the period fixed by the order, provided that no decree settling the account of the personal representative has been made and that twelve months have not elapsed since the issuance of letters. An application for relief from a default and for an extension of time to elect shall be made upon a petition showing reasonable cause and on notice to such persons and in such manner as the surrogate may direct. A certified copy of such order shall be indexed and recorded in the same manner as a notice of pendency of an action in the office of the clerk of each county in which real property of the decedent is situated.

(3) The time limited in this paragraph for making an election is exclusive and shall not be suspended or otherwise affected by any provision of law, except that the surrogate may, in his discretion, permit an election to be made in behalf of an infant or incompetent spouse at any time up to, but not later than, the entry of the decree of the first judicial account of the permanent representative of the estate, made more than seven months after the issuance of letters.

(f) Waiver or release of right of election.

(1) A spouse, during the lifetime of the other, may waive or release a right of election, granted by this section, against a particular or any last will or a testamentary substitute, as described in subparagraph (b) (1), made by the other spouse. A waiver or release of all rights in the estate of the other spouse is a waiver or release of a right of election against any such last will or testamentary provision.

(2) To be effective under this section, a waiver or release must be in writing and subscribed by the maker thereof, and acknowledged or proved in the manner required by the laws of this state for the recording of a conveyance of real property.

(3) Such a waiver or release is effective, in accordance with its

terms, whether:

(A) Executed before or after the marriage of the spouses.

(B) Executed before, on or after September first, nineteen hundred sixty-six.

(C) Unilateral in form, executed only by the maker thereof, or bilateral in form, executed by both spouses.

(D) Executed with or without consideration.

(E) Absolute or conditional.

#### **§ 5-1.1-A Right of election by surviving spouse**

(a) Where a decedent dies on or after September first, nineteen hundred ninety-two and is survived by a spouse, a personal right of election is given to the surviving spouse to take a share of the decedent's estate, subject to the following:

(1) For the purpose of this section, the decedent's estate includes the capital value, as of the decedent's death, of any property described in subparagraph (b) (1).

(2) The elective share, as used in this paragraph, is the pecuniary amount equal to the greater of (i) fifty thousand dollars or, if the capital value of the net estate is less than fifty thousand dollars, such capital value, or (ii) one third of the net estate. In computing the net estate, debts, administration expenses and reasonable funeral expenses shall be deducted, but all estate taxes shall be disregarded, except that nothing contained herein relieves the surviving spouse from contributing to all such taxes the amounts apportioned against him or her under 2-1.8.

(3) The term "testamentary provision", as used in this paragraph, includes, in addition to dispositions made by the decedent's will, distributions of property pursuant to 4-1.1 and any transaction described as a testamentary substitute in subparagraph (b) (1).

(4) The share of the testamentary provisions to which the surviving spouse is entitled hereunder (the "net elective share") is his or her elective share, as defined in subparagraphs (1) and (2), reduced by the capital value of any interest which passes absolutely from the decedent to such spouse, or which would have passed absolutely from the decedent to such spouse but was renounced by the spouse, (i) by intestacy, (ii)

by testamentary substitute as described in subparagraph (b) (1), or (iii) by disposition under the decedent's last will.

(A) Unless the decedent has provided otherwise, if a spouse elects under this section, such election shall have the same effect with respect to any interest which passes or would have passed to the spouse, other than absolutely, as though the spouse died on the same date but immediately before the death of the decedent.

(B) For the purposes of this subparagraph (4), (i) an interest in property shall be deemed to pass other than absolutely from the decedent to the spouse if the interest so passing consists of less than the decedent's entire interest in that property or consists of any interest in a trust or trust equivalent created by the decedent; and (ii) an interest in property shall be deemed to pass absolutely from the decedent to the spouse if it is not deemed to pass other than absolutely.

(5) Where a decedent dies before September first, nineteen hundred ninety-four, paragraphs (c)(1)(D) through (c)(1)(K) of section 5-1.1 shall apply except that the words "fifty thousand dollars" shall be substituted for the words "ten thousand dollars" wherever they appear in such paragraphs.

(b) Inter vivos dispositions treated as testamentary substitutes for the purpose of election by surviving spouse.

(1) Where a person dies after August thirty-first, nineteen hundred ninety-two and is survived by a spouse who exercises a right of election under paragraph (a), the transactions affected by and property interests of the decedent described in clauses (A) through (H), whether benefiting the surviving spouse or any other person, shall be treated as testamentary substitutes and the capital value thereof, as of the decedent's death, shall be included in the net estate subject to the surviving spouse's elective right except to the extent that the surviving spouse has executed a waiver of release pursuant to paragraph (e) with respect thereto. Notwithstanding the foregoing, a transaction, other than a transaction described in clause (G), that is irrevocable or is revocable only with the consent of a person having a substantial adverse interest (including any such transactions with respect to which the decedent retained a special power of appointment as defined in 10-3.2), will constitute a testamentary substitute only if it is

effected after the date of the marriage.

(A) Gifts causa mortis.

(B) The aggregate transfers of property (including the transfer, release or relinquishment of any property interest which, but for such transfer, release or relinquishment, would come within the scope of clause (F)), other than gifts causa mortis and transfers coming within the scope of clauses (G) and (H), to or for the benefit of any person, made after August thirty-first, nineteen hundred ninety-two, and within one year of the death of the decedent, to the extent that the decedent did not receive adequate and full consideration in money or money's worth for such transfers; provided, however, that any portion of any such transfer that was excludible from taxable gifts pursuant to subsections (b) and (e) of section two thousand five hundred three of the United States Internal Revenue Code, including any amounts excluded as a result of the election by the surviving spouse to treat any such transfer as having been made one half by him or her, shall not be treated as a testamentary substitute.

(C) Money deposited, together with all dividends or interest credited thereon, in a savings account in the name of the decedent in trust for another person, with a banking organization, savings and loan association, foreign banking corporation or organization or bank or savings and loan association organized under the laws of the United States, and remaining on deposit at the date of the decedent's death.

(D) Money deposited after August thirty-first, nineteen hundred sixty-six, together with all dividends or interest credited thereon, in the name of the decedent and another person and payable on death, pursuant to the terms of the deposit or by operation of law, to the survivor, with a banking organization, savings and loan association, foreign banking corporation or organization or bank or savings and loan association organized under the laws of the United States, and remaining on deposit at the date of the decedent's death.

(E) Any disposition of property made by the decedent whereby property, at the date of his or her death, is held (i) by the decedent and another person as joint tenants with a right of survivorship or as tenants by the entirety where the disposition was made after August thirty-first, nineteen hundred sixty-six, or (ii) by the decedent and is payable on his or her death to a person other than the decedent or his or her

estate.

(F) Any disposition of property or contractual arrangement made by the decedent, in trust or otherwise, to the extent that the decedent (i) after August thirty-first, nineteen hundred ninety-two, retained for his or her life or for any period not ascertainable without reference to his or her death or for any period which does not in fact end before his or her death the possession or enjoyment of, or the right to income from, the property except to the extent that such disposition or contractual arrangement was for an adequate consideration in money or money's worth; or (ii) at the date of his or her death retained either alone or in conjunction with any other person who does not have a substantial adverse interest, by the express provisions of the disposing instrument, a power to revoke such disposition or a power to consume, invade or dispose of the principal thereof. The provisions of this subparagraph shall not affect the right of any income beneficiary to the income undistributed or accrued at the date of death nor shall they impair or defeat any right which has vested on or before August thirty-first, nineteen hundred ninety-two.

(G) Any money, securities or other property payable under a thrift, savings, retirement, pension, deferred compensation, death benefit, stock bonus or profit-sharing plan, account, arrangement, system or trust, except that with respect to a plan to which subsection (a) (11) of section four hundred one of the United States Internal Revenue Code applies or a defined contribution plan to which such subsection does not apply pursuant to paragraph (B) (iii) thereof, only to the extent of fifty percent of the capital value thereof. Notwithstanding the foregoing, a transaction described herein shall not constitute a testamentary substitute if the decedent designated the beneficiary or beneficiaries of the plan benefits on or before September first, nineteen hundred ninety-two and did not change such beneficiary designation thereafter.

(H) Any interest in property to the extent the passing of the principal thereof to or for the benefit of any person was subject to a presently exercisable general power of appointment, as defined in section two thousand forty-one of the United States Internal Revenue Code, held by the decedent immediately before his or her death or which the decedent, within one year of his or her death, released (except to

the extent such release results from a lapse of the power which is not treated as a release pursuant to section two thousand forty-one of the United States Internal Revenue Code) or exercised in favor of any person other than himself or herself or his or her estate.

(I) A transfer of a security to a beneficiary pursuant to part 4 of article 13 of this chapter.

(2) Transactions described in clause (D) or (E) (i) shall be treated as testamentary substitutes in the proportion that the funds on deposit were the property of the decedent immediately before the deposit or the consideration for the property described in clause (E) (i) was furnished by the decedent. The surviving spouse shall have the burden of establishing the proportion of the decedent's contribution; provided, however, that where the surviving spouse is the other party to the transaction, it will be conclusively presumed that the proportion of the decedent's contribution is one-half. For the purpose of this subparagraph, the court may accept such evidence as is relevant and competent, whether or not the person offering such evidence would otherwise be competent to testify.

(3) The property referred to in clause (E) shall include United States savings bonds and other United States obligations.

(4) The provisions of this paragraph shall not prevent a corporation or other person from paying or transferring any funds or property to a person otherwise entitled thereto, unless there has been served personally upon such corporation or other person a certified copy of an order enjoining such payment or transfer made by the surrogate's court having jurisdiction of the decedent's estate or by another court of competent jurisdiction. A corporation or other person paying or transferring any funds or property described in clause (G) of subparagraph one of this paragraph to a person otherwise entitled thereto, shall be held harmless and free from any liability for making such payment or transfer, in any action or proceeding which involves such funds or property. Such order may be made, on notice to such persons and in such manner as the court may direct, upon application of the surviving spouse or any other interested party and on proof that the surviving spouse has exercised his or her right of election under paragraph (a). Service of a certified copy of such order on the corporation or other person holding such fund or property shall be a

defense, during the effective period of the order, in any action or proceeding which involves such fund or property.

(5) This paragraph shall not impair or defeat the rights of creditors of the decedent with respect to any matter as to which any such creditor has rights.

(6) In case of a conflict between this paragraph and any other provision of law affecting the transactions described in subparagraph (1) of this paragraph, this paragraph controls.

(7) If any part of this section is preempted by federal law with respect to a payment or an item of property included in the net estate, a person who, not for value, received that payment or item of property is obligated to return to the surviving spouse that payment or item of property or is personally liable to the surviving spouse for the amount of that payment or the value of that item of property, to the extent required under this section.

(c) General provisions governing right of election.

(1) Where an election has been made under this section, the will or other instrument making a testamentary provision, as the case may be, is valid as to the residue after the share to which the surviving spouse is entitled has been deducted, and the terms of such will or instrument remain otherwise effective so far as possible, subject, however, to the provisions of clause (a)(4)(A).

(2) Except as otherwise expressly provided in the will or other instrument making a testamentary provision, ratable contribution to the share to which the surviving spouse is entitled shall be made by the beneficiaries and distributees (including the recipients of any such testamentary provision), other than the surviving spouse, under the decedent's will, by intestacy and other instruments making testamentary provisions, which contribution may be made in cash or in the specific property received from the decedent by the person required to make such contribution or partly in cash and partly in such property as such person in his or her discretion shall determine.

(3) The right of election is personal to the surviving spouse, except that an election may be made by:

(A) The guardian of the property of an infant spouse, when so authorized by the court having jurisdiction of the decedent's estate.

(B) The committee of an incompetent spouse, when so authorized by the

court that appointed the committee.

(C) The conservator of a conservatee spouse, when so authorized by the court that appointed the conservator.

(D) The guardian ad litem for the surviving spouse when so authorized by the court that appointed such guardian.

(E) A guardian authorized under Article 81 of the mental hygiene law, when so authorized by the court that appointed the guardian.

(4) Any question arising as to the right of election shall be determined by the court having jurisdiction of the decedent's estate in a proceeding brought for that purpose on notice to all interested persons in such manner as the court may direct, or in a proceeding for the judicial settlement of the accounts of the personal representative.

(5) Upon application by a surviving spouse who has made an election under this section, the court may make an order cancelling such election, provided that no adverse rights have intervened and no prejudice is shown to creditors of such spouse or other persons interested in the estate. Such application shall be made on notice to such persons and in such manner as the court may direct. A certified copy of such order shall be indexed and recorded in the same manner as a notice of pendency of an action in the office of the clerk of the county in which any real property of the decedent is situated.

(6) The right of election granted by this section is not available to the spouse of a decedent who was not domiciled in this state at the time of death, unless such decedent has elected, under paragraph (h) of 3-5.1, to have the disposition of his or her property situated in this state governed by the laws of this state.

(7) The decedent's estate shall include all property of the decedent wherever situated.

(8) An election made by the surviving spouse under this section is in lieu of any right of dower to which such spouse may be entitled.

(9) The references in this paragraph to sections of the United States Internal Revenue Code are to the Internal Revenue Code of 1986, as amended. Such references, however, shall be deemed to constitute references to any corresponding provisions of any subsequent federal tax code.

(d) Procedure for exercise of right of election.

(1) An election under this section must be made within six months from

the date of issuance of letters testamentary or of administration, as the case may be, but in no event later than two years after the date of decedent's death, except as otherwise provided in subparagraph 2 of this paragraph. Written notice of such election shall be served upon any personal representative in the manner herein provided, or upon a person named as executor in a will on file in the surrogate's court in a case where such will has not yet been admitted to probate, and the original thereof shall be filed and recorded, with proof of service, in the surrogate's court in which such letters were issued within six months from the date of the issuance of letters but in no event later than two years from the date of decedent's death, except as otherwise provided in subparagraph 2 of this paragraph. Such notice may be served by mailing a copy thereof, addressed to any personal representative, or to the nominated executor, as the case may be, at the place of residence stated in the designation required by section 708 of the surrogate's court procedure act, to the domicile address of such nominated executor, or in such other manner as the surrogate may direct.

(2) The time to make such election may be extended before expiration by an order of the surrogate's court from which such letters issued for a further period not exceeding six months upon any one application. If the spouse defaults in filing such election within the time provided in subparagraph (1) of this paragraph, the surrogate's court may relieve the spouse from such default and authorize the making of an election within the period fixed by the order, provided that no decree settling the account of the personal representative has been made and that twelve months have not elapsed since the issuance of the letters, and two years have not elapsed since the decedent's date of death, in the case of initial application; except that the court may, in its discretion for good cause shown, extend the time to make such election beyond such period of two years. An application for relief from the default and for an extension of time to elect shall be made upon a petition showing reasonable cause and on notice to such persons and in such manner as the surrogate may direct. A certified copy of such order shall be indexed and recorded in the same manner as a notice of pendency of an action in the office of the clerk of each county in which real property of the decedent is situated.

(3) The time limited in this paragraph for making an election is

exclusive and shall not be suspended or otherwise affected by any provision of law, except that the surrogate may, in his or her discretion, permit an election to be made in behalf of an infant or incompetent spouse at any time up to, but no later than, the entry of the decree of the first judicial account of the representative of the estate, made more than seven months after the issuance of letters.

(e) Waiver or release of right of election.

(1) A spouse, during the lifetime of the other, may waive or release a right of election, granted by this section, against a particular or any last will or a testamentary substitute, as described in subparagraph (b) (1) made by the other spouse. A waiver or release of all rights in the estate of the other spouse is a waiver or release of a right of election against any such last will or testamentary provision.

(2) To be effective under this section, a waiver or release must be in writing and subscribed by the maker thereof, and acknowledged or proved in the manner required by the laws of this state for the recording of a conveyance of real property.

(3) Such a waiver or release is effective, in accordance with its terms, whether:

(A) Executed before or after the marriage of the spouses.

(B) Executed before, on or after September first, nineteen hundred sixty-six.

(C) Unilateral in form, executed only by the maker thereof, or bilateral in form, executed by both spouses.

(D) Executed with or without consideration.

(E) Absolute or conditional.

(4) If there is in effect at the time of the decedent's death a waiver, or a consent to the decedent's waiver, executed by the surviving spouse with respect to any survivor benefit, or right to such benefit, under subsection (a) (11) of section four hundred one or section four hundred seventeen of the United States Internal Revenue Code, then such waiver shall be deemed to be a waiver within the meaning of this paragraph (e) against the testamentary substitute constituting such benefit.

## **§ 5-1.2 Disqualification as surviving spouse**

(a) A husband or wife is a surviving spouse within the meaning, and for the purposes of 4-1.1, 5-1.1, 5-1.1-A, 5-1.3, 5-3.1 and 5-4.4, unless it is established satisfactorily to the court having jurisdiction of the action or proceeding that:

(1) A final decree or judgment of divorce, of annulment or declaring the nullity of a marriage or dissolving such marriage on the ground of absence, recognized as valid under the law of this state, was in effect when the deceased spouse died.

(2) The marriage was void as incestuous under section five of the domestic relations law, bigamous under section six thereof, or a prohibited remarriage under section eight thereof.

(3) The spouse had procured outside of this state a final decree or judgment of divorce from the deceased spouse, of annulment or declaring the nullity of the marriage with the deceased spouse or dissolving such marriage on the ground of absence, not recognized as valid under the law of this state.

(4) A final decree or judgment of separation, recognized as valid under the law of this state, was rendered against the spouse, and such decree or judgment was in effect when the deceased spouse died.

(5) The spouse abandoned the deceased spouse, and such abandonment continued until the time of death.

(6) A spouse who, having the duty to support the other spouse, failed or refused to provide for such spouse though he or she had the means or ability to do so, unless such marital duty was resumed and continued until the death of the spouse having the need of support.

### **§ 5-1.3 Revocatory effect of marriage after execution of will**

(a) If the testator leaves a will executed prior to September first, nineteen hundred thirty and marries at any time after such will was executed, the spouse who survives such testator is entitled to succeed to the same portion of the testator's estate as would have passed to such spouse had the testator died intestate, unless provision was made for the surviving spouse by ante nuptial agreement in writing. No evidence shall be admissible to impair or defeat the rights of a surviving spouse hereunder except to establish the existence of such ante nuptial agreement.

(b) A surviving spouse may recover the portion of the testator's estate to which he is entitled under this section from the beneficiaries, ratably, out of the portions of the estate passing to such persons under the will. In abating the interests of the beneficiaries the character of the testamentary plan adopted by the testator shall be preserved to the maximum extent possible.

(c) A surviving spouse may waive his right under this section to an intestate share of the testator's estate, and may accept in lieu thereof any benefits he may have received, in whatever status, under the will.

**§ 5-1.4 Revocatory effect of divorce, annulment or declaration of nullity, or dissolution of marriage on disposition, appointment, provision, or nomination regarding a former spouse**

(a) Except as provided by the express terms of a governing instrument, a divorce (including a judicial separation as defined in subparagraph (f)(2)) or annulment of a marriage revokes any revocable (1) disposition or appointment of property made by a divorced individual to, or for the benefit of, the former spouse, including, but not limited to, a disposition or appointment by will, by security registration in beneficiary form (TOD), by beneficiary designation in a life insurance policy or (to the extent permitted by law) in a pension or retirement benefits plan, or by revocable trust, including a bank account in trust form, (2) provision conferring a power of appointment or power of disposition on the former spouse, and (3) nomination of the former spouse to serve in any fiduciary or representative capacity, including as a personal representative, executor, trustee, conservator, guardian, agent, or attorney-in-fact.

(b)(1) Provisions of a governing instrument are given effect as if the former spouse had predeceased the divorced individual as of the time of the revocation.

(2) A disposition, appointment, provision, or nomination revoked solely by this section shall be revived by the divorced individual's remarriage to the former spouse.

(c) Except as provided by the express terms of a governing instrument, a divorce (including a judicial separation as defined in subparagraph (f)(2)) or annulment of a marriage severs the interests of the divorced

individual and the former spouse in property held by them at the time of the divorce or annulment as joint tenants with the right of survivorship, transforming their interests into interests as tenants in common.

(d)(1) A payor or other third party is not liable for having made a payment or transferred an item of property or any other benefit to a beneficiary (including a former spouse) designated in a governing instrument affected by a divorce, annulment, or remarriage, or for having taken any other action in good faith reliance on the validity of the governing instrument, before the payor or other third party received written notice of the divorce, annulment, or remarriage.

(2) Written notice of a divorce, annulment, or remarriage under subparagraph (1) must be mailed to the payor's or other third party's main office or home by registered or certified mail, return receipt requested, or served upon the payor or other third party in the same manner as a summons in a civil action and may be filed with the secretary of state if real property or a cooperative apartment is affected. Upon receipt of written notice of the divorce, annulment, or remarriage, a payor or other third party may pay any amount owed or transfer or deposit any item of property held by it or with the court having jurisdiction of the probate proceedings relating to the decedent's estate or, if no proceedings have been commenced, to or with the court having jurisdiction over the divorce, the real property or cooperative apartment, securities, bank accounts or other assets affected by the divorce or annulment under this section. The court shall hold the funds or item of property and, upon its determination under this section, shall order disbursement or transfer in accordance with the determination. Payments, transfers, or deposits made to or with the court discharge the payor or other third party from all claims for the value of amounts paid to or items of property transferred to or deposited with the court.

(e) A person who purchases property from a former spouse or any other person for value and without notice, or who receives from a former spouse or any other person, a payment or other item of property in partial or full satisfaction of a legally enforceable obligation, is neither obligated under this section to return the payment, item of property or benefit, nor is liable under this section for the amount of

the payment or the value of the item of property or benefit. But a former spouse or other person who, not for value, received a payment, item of property or any other benefit to which that person is not entitled under this section is obligated to return the payment, item of property or benefit, with interest thereon, to the person who is entitled to it under this section.

(f) For purposes of this section, the following terms shall have the following meaning and effect:

(1) "Disposition or appointment of property" includes a transfer of an item of property or any other benefit to a beneficiary designated in a governing instrument.

(2) "Divorce or annulment" means a final decree or judgment of divorce or annulment, or a final decree, judgment or order declaring the nullity of a marriage or dissolving such marriage on the ground of absence, recognized as valid under the law of this state, or a "judicial separation," which means a final decree or judgment of separation, recognized as valid under the law of this state, which was rendered against the spouse.

(3) "Divorced individual" includes an individual whose marriage has been annulled or subjected to a judicial separation.

(4) "Former spouse" means a person whose marriage to the divorced individual has been the subject of a divorce, annulment, or judicial separation.

(5) "Governing instrument" includes, but is not limited to, a will, testamentary instrument, trust agreement (including, but not limited to a totten trust account under 7-5.1(d)), insurance policy, thrift, savings, retirement, pension, deferred compensation, death benefit, stock bonus or profit-sharing plan, account, arrangement, system or trust, agreement with a bank, brokerage firm or investment company, registration of securities in beneficiary form pursuant to part 4 of article 13 of this chapter, a court order, or a contract relating to the division of property made between the divorced individuals before or after the marriage, divorce, or annulment.

(6) "Revocable," with respect to a disposition, appointment, provision, or nomination, means one under which the divorced individual, at the time of the divorce or annulment, was empowered, by law or under governing instrument, either alone or in conjunction with any other

person who does not have a substantial adverse interest, to cancel the designation in favor of the former spouse, whether or not the divorced individual was then empowered to designate himself or herself in place of the former spouse and whether or not the divorced individual then had the capacity to exercise the power.

### **PART 3. RIGHTS OF FAMILY UNIT**

#### **§ 5-3.1 Exemption for benefit of family**

(a) If a person dies, leaving a surviving spouse or children under the age of twenty-one years, the following items of property are not assets of the estate but vest in, and shall be set off to such surviving spouse, unless disqualified, under 5-1.2, from taking an elective or distributive share of the decedent's estate. In case there is no surviving spouse or such spouse, if surviving, is disqualified, such items of property vest in, and shall be set off to the decedent's children under the age of twenty-one years:

(1) All housekeeping utensils, musical instruments, sewing machine, jewelry unless disposed of in the will, clothing of the decedent, household furniture and appliances, electronic and photographic devices, and fuel for personal use, not exceeding in aggregate value twenty thousand dollars. This subparagraph shall not include items used exclusively for business purposes.

(2) The family bible or other religious books, family pictures, books, computer tapes, discs and software, DVDs, CDs, audio tapes, record albums, and other electronic storage devices, including but not limited to videotapes, used by such family, not exceeding in value two thousand five hundred dollars.

(3) Domestic and farm animals with their necessary food for sixty days, farm machinery, one tractor and one lawn tractor, not exceeding in aggregate value twenty thousand dollars.

(4) The surviving spouse or decedent's children may acquire items referred to in subparagraphs (1), (2) and (3) of this paragraph, in excess of the values set forth in such subparagraphs by payment to the estate of the amount by which the value of the items acquired exceeds

the amounts set forth in such subparagraphs. If any item so acquired by the spouse or children of the decedent was a specific legacy in decedent's will, the payment to the estate for such item shall vest in the specific legatee.

(5) One motor vehicle not exceeding in value twenty-five thousand dollars. In the alternative, if the decedent shall have been the owner of one or more motor vehicles each of which exceed twenty-five thousand dollars in value, the surviving spouse or decedent's children may acquire one such motor vehicle from the estate, regardless of the fact that the decedent may also have been the owner of another motor vehicle of lesser value than twenty-five thousand dollars, by payment to the estate of the amount by which the value of the motor vehicle exceeds twenty-five thousand dollars; in lieu of receiving such motor vehicle, the surviving spouse or children may elect to receive in cash an amount equal to the value of the motor vehicle, not to exceed twenty-five thousand dollars. If any motor vehicle so acquired by the spouse or children of the decedent was a specific legacy in decedent's will, the payment to the estate of the amount by which the value of the motor vehicle exceeds twenty-five thousand dollars shall vest in the specific legatee.

(6) Money including but not limited to cash, checking, savings and money market accounts, certificates of deposit or equivalents thereof, and marketable securities, not exceeding in value twenty-five thousand dollars, reduced by the excess value, if any, of acquired items referred to in subparagraphs (1), (2), (3) and (5) of this paragraph. However, where assets are insufficient to pay the reasonable funeral expenses of the decedent, the personal representative must first apply such money to defray any deficiency in such expenses.

(7) Any set off to a child under the age of twenty-one years not exceeding ten thousand dollars shall be covered by the provisions of section twenty-two hundred twenty of the surrogate's court procedure act as if the child were a beneficiary of the estate. Any excess amounts shall be governed by the guardianship statute, if applicable.

(8) The court shall have the authority to issue such documentation as necessary to effectuate the transfer of any items under this section.

(b) No allowance shall be made in money or other property if the items of property described in subparagraph (1), (2), (3) or (5) of paragraph

(a) are not in existence when the decedent dies.

(c) The items of property, set off as provided in paragraph (a), shall, at least to the extent thereof, be deemed reasonably required for the support of the surviving spouse or children under the age of twenty-one years of the decedent during the settlement of the estate.

(d) As used in this section, the term "value" shall refer to the fair market value of each item, reduced by all outstanding security interests or other encumbrances affecting the decedent's ownership of said item.

### **§ 5-3.2 Revocatory effect of birth of child after execution of will**

(a) Whenever a testator has a child born after the execution of a last will, and dies leaving the after-born child unprovided for by any settlement, and neither provided for nor in any way mentioned in the will, every such child shall succeed to a portion of the testator's estate as herein provided:

(1) If the testator has one or more children living when he executes his last will, and:

(A) No provision is made therein for any such child, an after-born child is not entitled to share in the testator's estate.

(B) Provision is made therein for one or more of such children, an after-born child is entitled to share in the testator's estate, as follows:

(i) The portion of the testator's estate in which the after-born child may share is limited to the disposition made to children under the will.

(ii) The after-born child shall receive such share of the testator's estate, as limited in subclause (i), as he would have received had the testator included all after-born children with the children upon whom benefits were conferred under the will, and given an equal share of the estate to each such child.

(iii) If it appears from the will that the intention of the testator was to make a limited provision which specifically applied only to the testator's children living at the time the will was executed, the after-born child succeeds to the portion of such testator's estate as would have passed to such child had the testator died intestate.

(iv) To the extent that it is feasible, the interest of the after-born child in the testator's estate shall be of the same character, whether

an equitable or legal life estate or in fee, as the interest which the testator conferred upon his children under the will.

(2) If the testator has no child living when he executes his last will, the after-born child succeeds to the portion of such testator's estate as would have passed to such child had the testator died intestate.

(b) The term "after-born child" shall mean a child of the testator born during the testator's lifetime or in gestation at the time of the testator's death and born thereafter. For purposes of this section, a non-marital child, born after the execution of a last will shall be considered an after-born child of his or her father where paternity is established pursuant to section 4-1.2 of this chapter.

(c) The after-born child may recover the share of the testator's estate to which such child is entitled, either from the other children under subparagraph (a) (1) (B) or the testamentary beneficiaries under subparagraph (a) (2), ratably, out of the portions of such estate passing to such persons under the will. In abating the interests of such beneficiaries, the character of the testamentary plan adopted by the testator shall be preserved to the maximum extent possible.

**§ 5-3.4 Action in supreme court by child born after execution of will,**  
by surviving spouse upon revocation of will by marriage or by  
subscribing witness with interest under will

In the event that the administration of a decedent's estate in the surrogate's court has been completed and the estate distributed, an action may be maintained in the supreme court by an after-born child under 5-3.2, a surviving spouse under 5-1.3 or an attesting witness under 3-3.2 to enforce rights under such sections against testamentary beneficiaries or distributees, as the case may be.

**PART 4. RIGHTS OF MEMBERS OF FAMILY RESULTING FROM  
WRONGFUL ACT, NEGLECT OR DEFAULT CAUSING DEATH  
OF DECEDENT**

#### **§ 5-4.1 Action by personal representative for wrongful act, neglect or default causing death of decedent**

1. The personal representative, duly appointed in this state or any other jurisdiction, of a decedent who is survived by distributees may maintain an action to recover damages for a wrongful act, neglect or default which caused the decedent's death against a person who would have been liable to the decedent by reason of such wrongful conduct if death had not ensued. Such an action must be commenced within two years after the decedent's death; provided, however, that an action on behalf of a decedent whose death was caused by the terrorist attacks on September eleventh, two thousand one, other than a decedent identified by the attorney general of the United States as a participant or conspirator in such attacks, must be commenced within two years and six months after the decedent's death. When the distributees do not participate in the administration of the decedent's estate under a will appointing an executor who refuses to bring such action, the distributees are entitled to have an administrator appointed to prosecute the action for their benefit.

2. Whenever it is shown that a criminal action has been commenced against the same defendant with respect to the event or occurrence from which a claim under this section arises, the personal representative of the decedent shall have at least one year from the termination of the criminal action as defined in section 1.20 of the criminal procedure law in which to maintain an action, notwithstanding that the time in which to commence such action has already expired or has less than a year remaining.

#### **§ 5-4.2 Trial and burden of proof of contributory negligence**

On the trial of an action accruing before September first, nineteen hundred seventy-five to recover damages for causing death the contributory negligence of the decedent shall be a defense, to be pleaded and proved by the defendant.

### **§ 5-4.3 Amount of recovery**

(a) The damages awarded to the plaintiff may be such sum as the jury or, where issues of fact are tried without a jury, the court or referee deems to be fair and just compensation for the pecuniary injuries resulting from the decedent's death to the persons for whose benefit the action is brought. In every such action, in addition to any other lawful element of recoverable damages, the reasonable expenses of medical aid, nursing and attention incident to the injury causing death and the reasonable funeral expenses of the decedent paid by the distributees, or for the payment of which any distributee is responsible, shall also be proper elements of damage. Interest upon the principal sum recovered by the plaintiff from the date of the decedent's death shall be added to and be a part of the total sum awarded.

(b) Where the death of the decedent occurs on or after September first, nineteen hundred eighty-two, in addition to damages and expenses recoverable under paragraph (a) above, punitive damages may be awarded if such damages would have been recoverable had the decedent survived.

(c) (i) In any action in which the wrongful conduct is medical malpractice or dental malpractice, evidence shall be admissible to establish the federal, state and local personal income taxes which the decedent would have been obligated by law to pay.

(ii) In any such action tried by a jury, the court shall instruct the jury to consider the amount of federal, state and local personal income taxes which the jury finds, with reasonable certainty, that the decedent would have been obligated by law to pay in determining the sum that would otherwise be available for the support of persons for whom the action is brought.

(iii) In any such action tried without a jury, the court shall consider the amount of federal, state and local personal income taxes which the court finds, with reasonable certainty, that the decedent would have been obligated by law to pay in determining the sum that would otherwise be available for the support of persons for whom the action is brought.

#### **§ 5-4.4 Distribution of damages recovered**

(a) The damages, as prescribed by 5-4.3, whether recovered in an action or by settlement without an action, are exclusively for the benefit of the decedent's distributees and, when collected, shall be distributed to the persons entitled thereto under 4-1.1 and 5-4.5, except that where the decedent is survived by a parent or parents and a spouse and no issue, the parent or parents will be deemed to be distributees for purposes of this section. The damages shall be distributed subject to the following:

(1) Such damages shall be distributed by the personal representative to the persons entitled thereto in proportion to the pecuniary injuries suffered by them, such proportions to be determined after a hearing, on application of the personal representative or any distributee, at such time and on notice to all interested persons in such manner as the court may direct. If no action is brought, such determination shall be made by the surrogate of the county in which letters were issued to the plaintiff; if an action is brought, by the court having jurisdiction of the action or by the surrogate of the county in which letters were issued.

(2) The court which determines the proportions of the pecuniary injuries suffered by the distributees, as provided in subparagraph (1), shall also decide any question concerning the disqualification of a parent, under 4-1.4, or a surviving spouse, under 5-1.2, to share in the damages recovered.

(b) The reasonable expenses of the action or settlement and, if included in the damages recovered, the reasonable expenses of medical aid, nursing and attention incident to the injury causing death and the reasonable funeral expenses of the decedent may be fixed by the court which determines the proportions of the pecuniary injuries suffered by the distributees, as provided in subparagraph (1), upon notice given in such manner and to such persons as the court may direct, and such expenses may be deducted from the damages recovered. The commissions of the personal representative upon the residue may be fixed by the surrogate, upon notice given in such manner and to such persons as the surrogate may direct or upon the judicial settlement of the account of the personal representative, and such commissions may be deducted from the damages recovered.

(c) In the event that an action is brought, as authorized in this part, and there is no recovery or settlement, the reasonable expenses of such unsuccessful action, excluding counsel fees, shall be payable out of the assets of the decedent's estate.

#### **§ 5-4.5 Non-marital children**

For the purposes of this part, a non-marital child is the distributee of his father and paternal kindred and the father and paternal kindred of a non-marital child are that child's distributees to the extent permitted by 4-1.2.

#### **§ 5-4.6 Application to compromise action**

(a) Within sixty days of the application of an administrator appointed under 5-4.1 or a personal representative to the court in which an action for wrongful act, neglect or default causing the death of a decedent is pending, the court shall, after inquiry into the merits of the action and the amount of damages proposed as a compromise either disapprove the application or approve in writing a compromise for such amount as it shall determine to be adequate including approval of attorneys fees and other payable expenses as set forth below, and shall order the defendant to pay all sums payable under the order of compromise, within the time frames set forth in section five thousand three-a of the civil practice law and rules, to the attorney for the administrator or personal representative for placement in an interest bearing escrow account for the benefit of the distributees. The order shall also provide for the following:

(1) Upon collection of the settlement funds and creation of an interest bearing escrow account, the attorney for the administrator or personal representative shall pay from the account all due and payable expenses, excluding attorneys fees, approved by the court, such as medical bills, funeral costs and other liens on the estate.

(2) All attorneys fees approved by the court for the prosecution of the action for wrongful act, neglect or default, inclusive of all disbursements, shall be immediately payable from the escrow account upon

submission to the trial court proof of filing of a petition for allocation and distribution in the surrogate's court on behalf of the decedent's estate.

(3) The attorney for the administrator or personal representative in the action for wrongful act, neglect or default who receives payment under this section shall continue to serve as attorney for the estate until the entry of a final decree in the surrogate's court.

(b) If any of the distributees is an infant, incompetent, person who is incarcerated or person under disability, the court shall determine whether a guardian ad litem is required before any payments are made, in which case the court will seek an immediate appointment of a guardian ad litem by the surrogate's court or, if the surrogate's court defers, the court shall make such appointment. Any guardian appointed for this purpose shall continue to serve as the guardian ad litem for the person requiring same for all other purposes.

(c) The filing fee in the surrogate's court shall be computed based on the amount of the gross estate prior to any payments made under this paragraph.

(d) The written approval by such court of the compromise is conclusive evidence of the adequacy of the compromise in any proceeding in the surrogate's court for the final settlement of the account of such administrator or personal representative.

(e) Nothing in this section shall be deemed to preclude the attorney for the administrator or personal representative from petitioning the surrogate's court for approval of a compromise and for allocation and distribution thereof.

(f) No letters of administration shall be issued which will in any way serve to abrogate the rights or obligations of an administrator or personal representative or an attorney representing an administrator or personal representative under this section.

(g) In the case of a recovery of an award from the September eleventh victim compensation fund of two thousand one established pursuant to title IV of the federal air transportation safety and system stabilization act, public law 107-42, as amended, where the award consists solely of non-economic losses (funeral expense reimbursement being included as non-economic losses herein) a personal representative may file a consent to the adequacy of the award by all interested

parties in lieu of a compromise proceeding.

## ARTICLE 6

### **CLASSIFICATION, CREATION, DEFINITION OF, AND RULES GOVERNING ESTATES IN PROPERTY**

#### PART 1. ESTATES CLASSIFIED AS TO DURATION

Section 6-1.1 Estates classified.

6-1.2 Estates tail abolished; future estates limited thereon.

6-1.3 When estate for life of third person is real property;  
when personal property.

#### PART 2. ESTATES CLASSIFIED AS TO NUMBER OF PERSONS

Section 6-2.1 Estates in severalty, joint tenancy, tenancy by the  
entirety and in common.

6-2.2 When estate is in common, in joint tenancy or by the  
entirety.

#### PART 3. ESTATES CLASSIFIED AS TO TIME OF ENJOYMENT AND CREATION

Section 6-3.1 Estates in possession and future estates.

6-3.2 Kinds of future estates.

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6-3.4 When future estates are created.

#### PART 4. ESTATES DEFINED

Section 6-4.1 Definition of an estate in possession.

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6-4.3 Definition of a remainder.

6-4.4 Definition of reversion.

6-4.5 Definition of a possibility of reverter.

6-4.6 Definition of right of reacquisition.

6-4.7 Definition of a future estate indefeasibly vested.

6-4.8 Definition of a future estate vested subject to open.

6-4.9 Definition of a future estate vested subject to complete  
defeasance.

6-4.10 Definition of a future estate subject to a condition  
precedent.

#### PART 5. RULES GOVERNING FUTURE ESTATES

Section 6-5.1 Characteristics of future estates.

- 6-5.2 Power of appointment not to prevent vesting.
- 6-5.3 Future estates in the alternative.
- 6-5.4 Implication of cross remainders between tenants in common.
- 6-5.5 Future estate valid though contingency improbable.
- 6-5.6 Meaning of heirs, distributees and issue in certain remainders.
- 6-5.7 Posthumous children.
- 6-5.8 Heirs or distributees of life tenant take as purchasers.
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- 6-5.10 When future estates are defeated.
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#### PART 6. DISPOSITION OF COMMUNITY PROPERTY RIGHTS AT DEATH

- Section 6-6.1 Application.
- 6-6.2 Rebuttable presumptions.
  - 6-6.3 Disposition upon death.
  - 6-6.4 Perfection of title.
  - 6-6.5 Purchaser for value or lender.
  - 6-6.6 Effect and construction of part.
  - 6-6.7 Short title.

#### **PART 1. ESTATES CLASSIFIED AS TO DURATION**

##### **§ 6-1.1 Estates classified**

- (a) Estates in property as to duration are classified as follows:
  - (1) Fee simple absolute.
  - (2) Fee on condition.
  - (3) Fee on limitation.
  - (4) Estates for life.
  - (5) Estates for years.
  - (6) Estates from period to period.
  - (7) Estates at will.

(8) Estates by sufferance.

### **§ 6-1.2 Estates tail abolished; future estates limited thereon**

Estates tail have been abolished, and every estate which would be a fee tail, according to the law of this state as it existed before the twelfth day of July, seventeen hundred eighty-two, shall be a fee simple; and if no valid future estate is limited thereon, a fee simple absolute. Where a future estate in fee is limited on any estate which would be a fee tail, according to the law of this state as it existed previous to such date, such future estate is valid and vests in possession on the death of the first taker without issue living at the time of his death.

### **§ 6-1.3 When estate for life of third person is real property; when personal property**

A disposition of real property for the life of a third person, whether limited to heirs or otherwise, is real property only during the life of the grantee or devisee; after his death it is personal property.

## **PART 2. ESTATES CLASSIFIED AS TO NUMBER OF PERSONS**

### **§ 6-2.1 Estates in severalty, joint tenancy, tenancy by the entirety and in common**

Estates as to the number of persons owning an interest therein are classified as follows:

- (1) In severalty.
- (2) Joint tenancy.
- (3) Tenancy in common.

(4) Only as to real property and, on and after January first, nineteen hundred ninety-six, as to the shares of stock of a cooperative apartment

corporation allocated to an apartment or unit together with the appurtenant proprietary lease, tenancy by the entirety.

**§ 6-2.2 When estate is in common, in joint tenancy or by the entirety**

(a) A disposition of property to two or more persons creates in them a tenancy in common, unless expressly declared to be a joint tenancy.

(b) A disposition of real property to a husband and wife creates in them a tenancy by the entirety, unless expressly declared to be a joint tenancy or a tenancy in common.

(c) A disposition on or after January first, nineteen hundred ninety-six of the shares of stock of a cooperative apartment corporation allocated to an apartment or unit together with the appurtenant proprietary lease to a husband and wife creates in them a tenancy by the entirety, unless expressly declared to be a joint tenancy or a tenancy in the common.

(d) A disposition of real property, or a disposition on or after January first, nineteen hundred ninety-six of the shares of stock of a cooperative apartment corporation allocated to an apartment or unit together with the appurtenant proprietary lease, to persons who are not legally married to one another but who are described in the disposition as husband and wife, spouses, husbands, or wives creates in them a joint tenancy, unless expressly declared to be a tenancy in common.

(e) A disposition of property to two or more persons as executors, trustees or guardians creates in them a joint tenancy.

(f) Property passing in intestacy to two or more persons is taken by them as tenants in common.

**PART 3. ESTATES CLASSIFIED AS TO TIME OF ENJOYMENT AND CREATION**

**§ 6-3.1 Estates in possession and future estates**

Estates in property, as to the time of their enjoyment, are classified as estates in possession and future estates.

### **§ 6-3.2 Kinds of future estates**

- (a) Future estates are divided into:
  - (1) Estates left in the creator, consisting of:
    - (A) Reversions.
    - (B) Possibilities of reverter.
    - (C) Rights of reacquisition.
  - (2) Estates in favor of a person other than the creator, namely remainders, that are:
    - (A) Indefeasibly vested.
    - (B) Vested subject to open.
    - (C) Vested subject to complete defeasance.
    - (D) Subject to a condition precedent.

### **§ 6-3.3 Concerning the creation of certain future estates**

- (a) Subject to the provisions of article 9:
  - (1) An estate may be created to commence at a future time.
  - (2) An estate for life may be created in a term of years and a future estate limited thereon.
  - (3) A future estate may be limited after a term of years, provided that, if such future estate is subject to a condition precedent, the condition must occur within the period prescribed by article 9.
  - (4) A fee or a lesser estate may be limited on a fee, subject to a condition precedent which must occur within the period prescribed by article 9.

### **§ 6-3.4 When future estates are created**

A future estate is created when the disposition creating it becomes legally effective.

## **PART 4. ESTATES DEFINED**

#### **§ 6-4.1 Definition of an estate in possession**

An estate in possession is an estate which entitles the owner to the immediate possession of property.

#### **§ 6-4.2 Definition of a future estate**

A future estate is an estate limited to commence in possession at a future time, either without the intervention of a precedent estate or on the determination, by lapse of time or otherwise, of a precedent estate created at the same time.

#### **§ 6-4.3 Definition of a remainder**

A remainder is a future estate, as defined in 6-4.2, created in favor of a person other than the creator.

#### **§ 6-4.4 Definition of a reversion**

A reversion is the future estate, other than a possibility of reverter and a right of reacquisition, left in the creator or in his successors in interest upon the simultaneous creation of one or more lesser estates than the creator originally owned.

#### **§ 6-4.5 Definition of a possibility of reverter**

A possibility of reverter is the future estate left in the creator or in his successors in interest upon the simultaneous creation of an estate that will terminate automatically within a period of time defined by the occurrence of a specified event.

#### **§ 6-4.6 Definition of a right of reacquisition**

A right of reacquisition is the future estate left in the creator or in his successors in interest upon the simultaneous creation of an estate on a condition subsequent.

#### **§ 6-4.7 Definition of a future estate indefeasibly vested**

A future estate indefeasibly vested is an estate created in favor of one or more ascertained persons in being which is certain when created to become an estate in possession whenever and however the preceding estates end and which can in no way be defeated or abridged.

#### **§ 6-4.8 Definition of a future estate vested subject to open**

A future estate vested subject to open is an estate created in favor of a class of persons, one or more of whom are ascertained and in being, which is certain when created to become an estate in possession whenever and however the preceding estates end, and is subject to diminution by reason of another person becoming entitled to share therein.

#### **§ 6-4.9 Definition of a future estate vested subject to complete defeasance**

A future estate vested subject to complete defeasance is an estate created in favor of one or more ascertained persons in being, which would become an estate in possession upon the expiration of the preceding estates, but may end or may be terminated as provided by the creator at, before or after the expiration of such preceding estates.

#### **§ 6-4.10 Definition of a future estate subject to a condition precedent**

A future estate subject to a condition precedent is an estate created in favor of one or more unborn or unascertained persons or in favor of

one or more presently ascertainable persons upon the occurrence of an uncertain event.

## **PART 5. RULES GOVERNING FUTURE ESTATES**

### **§ 6-5.1 Characteristics of future estates**

Future estates are descendible, devisable and alienable, in the same manner as estates in possession.

### **§ 6-5.2 Power of appointment not to prevent vesting**

The existence of an unexecuted power of appointment does not prevent the vesting of a future estate, limited in default of the execution of the power.

### **§ 6-5.3 Future estates in the alternative**

Two or more future estates may be created to take effect in the alternative, so that if the first in order fails to vest, the next in succession is substituted for it and takes effect accordingly.

### **§ 6-5.4 Implication of cross remainders between tenants in common**

When a limitation, if contained in a will, would create a tenancy in common, with implied cross remainders, a like limitation, if contained in a deed, has the same effect.

### **§ 6-5.5 Future estate valid though contingency improbable**

A future estate, otherwise valid, shall not be void on the ground of

the improbability of the contingency on which it is limited to take effect.

#### **§ 6-5.6 Meaning of heirs, distributees and issue in certain remainders**

When a remainder is limited to take effect on the death of any person without heirs, heirs of the body, distributees or issue, the word "heirs", "heirs of the body", "distributees" or "issue" mean such persons living at the death of the person named as ancestor.

#### **§ 6-5.7 Posthumous children**

(a) Where a future estate is limited to children, distributees, heirs or issue, posthumous children are entitled to take in the same manner as if living at the death of their ancestors.

(b) A future estate conditioned upon the death of a person without children, distributees, heirs or issue is defeated by the birth of a child conceived before but born alive after the death of such person.

#### **§ 6-5.8 Heirs or distributees of life tenant take as purchasers**

When a remainder is limited to the heirs, heirs of the body or distributees of a person to whom a life estate in the same property is given, the persons who, on the termination of the life estate, are the heirs, heirs of the body or distributees of the life tenant take as purchasers.

#### **§ 6-5.9 Heirs or distributees of creator take as purchasers**

Where a remainder is limited to the heirs or distributees of the creator of an estate in property, such heirs or distributees take as purchasers.

#### **§ 6-5.10 When future estates are defeated**

A future estate cannot be defeated or barred by any disposition or other act of the owner of the precedent estate, nor by the destruction of such precedent estate by disseizen, forfeiture, surrender, merger or otherwise; but a future estate may be defeated in any manner which the creator has provided.

#### **§ 6-5.11 Non-destructibility of remainders subject to a condition precedent**

A remainder is not defeated by the determination of a precedent estate before the occurrence of the condition precedent on which the remainder was limited to take effect. If such condition precedent subsequently occurs, the remainder takes effect in the same manner and to the same extent as if the precedent estate had continued.

#### **§ 6-5.12 Future rents and profits subject to rules governing future estates**

A disposition of the rents, profits or other income from property accruing at any time subsequent to the execution of the instrument creating such disposition is subject to the rules governing future estates in property.

### **PART 6. DISPOSITION OF COMMUNITY PROPERTY RIGHTS AT DEATH**

#### **§ 6-6.1 Application**

This part applies to the disposition at death by a married person of all or the proportionate part of any personal property wherever situated which was acquired as or became, and remained, community property under the laws of another jurisdiction, and any personal property wherever

situated and real property situated in this state which was acquired with the rents, issues or income of, the proceeds from, or in exchange for, property acquired as or which became, and remained, community property under the laws of another jurisdiction, or property traceable to that community property.

### **§ 6-6.2 Rebuttable presumptions**

In determining whether this part applies to specific property acquired during a marriage by a spouse of that marriage the following rebuttable presumptions apply:

(a) Property acquired while domiciled in a jurisdiction under whose laws property could then be acquired as community property is presumed to have been acquired as or have become, and remained, property to which this part applies; and

(b) Property acquired while domiciled in a jurisdiction under whose laws property could not then be acquired as community property, title to which was taken in a form which created rights of survivorship, is presumed not to be property to which this part applies.

### **§ 6-6.3 Disposition upon death**

Upon the death of a married person, one-half of the property to which this part applies is the property of the surviving spouse and is not subject to testamentary disposition by the decedent nor to the laws of descent and distribution. One-half of that property is the property of the decedent and is subject to testamentary disposition by the decedent or the law of descent and distribution. With respect to property to which this part applies, the one-half of the property which is the property of the decedent is not subject to the surviving spouse's right to elect against the will.

### **§ 6-6.4 Perfection of title**

(a) If the title to any property to which this part applies was held

by the decedent at the time of death, title of the surviving spouse may be perfected by an order of the surrogate's court having jurisdiction over the decedent's estate or by execution of an instrument by the personal representative or the testamentary beneficiaries or distributees of the decedent with the approval of the court, upon due notice to all persons who would be required to be served with process in a proceeding under section twenty-two hundred ten of the surrogate's court procedure act. Neither the personal representative nor the court has a duty to discover or attempt to discover whether property held by the decedent is property to which this part applies, unless a written demand is made by the surviving spouse or the spouse's successor in interest.

(b) If the title to any property to which this part applies is held by the surviving spouse at the time of the decedent's death, the personal representative or a testamentary beneficiary or distributee of the decedent may institute an action to perfect title to the property. The personal representative has no fiduciary duty to discover or attempt to discover whether any property held by the surviving spouse is property to which this part applies, unless a written demand is made by a testamentary beneficiary, distributee or creditor of the decedent.

#### **§ 6-6.5 Purchaser for value or lender**

(a) If a surviving spouse has apparent title to property to which this part applies, a purchaser for value or a lender taking a security interest in the property takes his interest in the property free of any rights of the personal representative or a testamentary beneficiary or distributee of the decedent.

(b) If a personal representative or a testamentary beneficiary or distributee of the decedent has apparent title to property to which this part applies, a purchaser for value or a lender taking a security interest in the property takes his interest in the property free of any rights of the surviving spouse.

(c) A purchaser for value or a lender need not inquire whether a vendor or borrower acted properly.

(d) The proceeds of a sale or creation of a security interest shall be treated in the same manner as the property transferred to the purchaser

for value or a lender.

## **§ 6-6.6 Effect and construction of part**

This part does not effect rights of creditors nor prevent married persons from severing or altering their interests in property nor authorize testamentary dispositions of property otherwise limited or prohibited by law, and shall be so applied and construed as to effectuate its general purpose to make uniform the law with respect to the subject of this part among those states which enact similar legislation.

## **§ 6-6.7 Short title**

This part may be cited as "The New York uniform disposition of community property rights at death act".

# **ARTICLE 7**

## **TRUSTS**

### **PART 1. RULES GOVERNING TRUSTS**

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- 7-1.3 Purchase-money resulting trust abolished.
- 7-1.4 Purposes for which trust may be created.
- 7-1.5 When trust interest inalienable; exception.
- 7-1.6 Application of principal to income beneficiary.
- 7-1.7 Interest remaining in creator of trust.
- 7-1.8 Duration of trust for benefit of creditors.
- 7-1.9 Revocation of trusts.
- 7-1.10 Provision by non-domiciliary creator as to law to govern trust.
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- 7-1.12 Supplemental needs trusts established for persons with

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7-1.13 Division of trusts and establishment of separate trusts.

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7-1.17 Execution, amendment and revocation of lifetime trusts.

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## PART 2. RULES GOVERNING TRUSTEES

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7-2.2 When estate of trustee ceases.

7-2.3 Trust estate not to descend on death of trustee;  
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7-2.4 Act of trustee in contravention of trust.

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## **PART 1. RULES GOVERNING TRUSTS**

### **§ 7-1.1 When trust interests not to merge**

A trust is not merged or invalid because a person, including but not limited to the creator of the trust, is or may become the sole trustee and the sole holder of the present beneficial interest therein, provided that one or more other persons hold a beneficial interest therein, whether such interest be vested or contingent, present or future, and whether created by express provision of the instrument or as a result of reversion to the creator's estate.

### **§ 7-1.2 Trustee of passive trust not to take**

Every disposition of property shall be made directly to the person in whom the right to possession and income is intended to be vested and not to another in trust for such person, and if made to any person in trust for another, no estate, legal or equitable, vests in the trustee. But neither this section nor 7-1.1 shall apply to trusts arising or resulting by implication of law.

### **§ 7-1.3 Purchase-money resulting trust abolished**

(a) A disposition of property to one person for a valuable consideration paid, in whole or in part, by another is presumed fraudulent as against the creditors of the payor at the time of such disposition and, unless the presumption is rebutted, a trust results in favor of such creditors to the extent necessary to satisfy their claims; but title to the property vests in the transferee and no trust results to the payor unless the transferee either:

(1) Takes such property, in his own name, as an absolute transfer without the consent or knowledge of the payor; or

(2) In violation of some trust, purchases the property so transferred with money or property belonging to another.

#### **§ 7-1.4 Purposes for which trust may be created**

An express trust may be created for any lawful purpose.

#### **§ 7-1.5 When trust interest inalienable; exception**

(a) The interest of the beneficiary of any trust may be assigned or otherwise transferred, except that:

(1) The right of a beneficiary of an express trust to receive the income from property and apply it to the use of or pay it to any person may not be transferred by assignment or otherwise unless a power to transfer such right, or any part thereof, is conferred upon such beneficiary by the instrument creating or declaring the trust.

(2) The proceeds of a life insurance policy which, under a trust or other agreement, are upon the death of the insured left with the insurance company may not be (A) transferred, (B) subject to commutation or encumbrance or (C) subject to legal process except in an action for necessities, if provisions to such effect were incorporated in such trust or other agreement.

(b) Notwithstanding subparagraph (a) (1):

(1) The beneficiary of an express trust to receive income from property and apply it to the use of or pay it to any person may, unless otherwise provided in the instrument creating or declaring such trust, transfer any amount in excess of ten thousand dollars of the annual income to which the beneficiary is entitled from such trust to the spouse, issue, ancestors, brothers, sisters, uncles, aunts, nephews or nieces of the beneficiary, or to a trustee, committee, conservator, curator, custodian, guardian of the property of a minor, or the donee of a power during minority for the benefit only of any such person bearing such relationship to the beneficiary, provided that such transfer is evidenced by a written instrument signed and acknowledged by the beneficiary and delivered to the trustee of the trust, together with an affidavit by the beneficiary that such transfer and any like transfer concurrently in effect are for all or part of the excess over ten thousand dollars of the annual income from such trust to which such beneficiary is entitled, and that he has not received and is not to

receive any consideration in money or money's worth for the transfer.

(2) Any such transfer shall be effective in any year only as to income from such trust in excess of ten thousand dollars, and for this purpose all previous like transfers applicable to a given year shall be taken into account. In the event that two or more transfers are made in or for any year in a total amount exceeding the income from such trust properly transferable hereunder, transferees shall be preferred in the order in which the instruments of transfer were delivered to the trustee.

(3) A trustee shall be exonerated and fully discharged for any payment made to a transferee in reliance on the affidavit of a beneficiary described in subparagraph (1).

(4) The provisions of this paragraph do not apply to subparagraph (a) (2):

(c) A transferee of income may, if he has not received or is not to receive any consideration in money or money's worth therefor, make a further transfer of such income only to one or more of the permissible transferees referred to in subparagraph (b) (1), other than a prior transferor; provided, however, that upon the death of a transferee any income not so transferred by him shall be an asset of his estate, subject to his testamentary disposition or passing to his distributees under the statutes of descent and distribution.

(d) The beneficiary of an express trust to receive the income from property and apply it to the use of or pay it to any person is not precluded by anything contained in this section from transferring or assigning any part or all of such income to or for the benefit of persons whom the beneficiary is legally obligated to support.

#### **§ 7-1.6 Application of principal to income beneficiary**

(a) Notwithstanding any contrary provision of law, the court having jurisdiction of an express trust, heretofore created or declared, to receive the income from property and apply it to the use of or pay it to any person, unless otherwise provided in the disposing instrument, may in its discretion make an allowance from principal to any income beneficiary whose support or education is not sufficiently provided for, to the extent that such beneficiary is indefeasibly entitled to the principal of the trust or any part thereof or, in case the income

beneficiary is not entitled to the principal of the trust or any part thereof, to the extent that all persons beneficially interested in the trust are adult and competent and consent thereto in writing; provided that the court, after a hearing on notice to all those beneficially interested in the trust in such manner as the court may direct, is satisfied that the original purpose of the creator of the trust cannot be carried out and that such allowance effectuates the intention of the creator.

(b) Notwithstanding any contrary provision of law, the court having jurisdiction of an express trust, hereafter created or declared, to receive income from property and apply it to the use of or pay it to any person, unless otherwise provided in the disposing instrument, may in its discretion make an allowance from principal to any income beneficiary whose support or education is not sufficiently provided for, whether or not such person is entitled to the principal of the trust or any part thereof; provided that the court, after a hearing on notice to all those beneficially interested in the trust in such manner as the court may direct, is satisfied that the original purpose of the creator of the trust cannot be carried out and that such allowance effectuates the intention of the creator.

(c) In the event that an income beneficiary to whom an allowance is made, as provided in this section, is or becomes entitled to a share of the principal of the trust, such allowance, without interest thereon, shall be a charge upon such share.

(d) If the application or the possibility of the application of this section to any trust would reduce or eliminate a charitable deduction otherwise available to any person or entity under the income tax, gift tax or estate tax provisions of the internal revenue code, the provisions of this section shall not apply to such trust.

(e) A supplemental needs trust which conforms to the provisions of 7-1.12 of this article shall be construed in accordance with the provisions of that section.

### **§ 7-1.7 Interest remaining in creator of trust**

Every legal estate and interest not embraced in an express trust and

not otherwise disposed of remains in the creator.

#### **§ 7-1.8 Duration of trust for benefit of creditors**

(a) Where an estate in real property has heretofore vested or shall hereafter vest in an assignee or other trustee for the benefit of creditors, it shall cease at the expiration of ten years from the time the trust was created, except where a different limitation is contained in the instrument creating the trust or is otherwise prescribed by law. Such estate shall thereupon revert to the assignor.

(b) This section does not apply to a trust of personal property or to a trust of real property created in connection with the salvaging of mortgage participation certificates. Nor does this section affect any rights to the proceeds of a sale of real property made by the assignee or other trustee for the benefit of creditors.

#### **§ 7-1.9 Revocation of trusts**

(a) Upon the written consent, acknowledged or proved in the manner required by the laws of this state for the recording of a conveyance of real property, of all the persons beneficially interested in a trust of property, heretofore or hereafter created, the creator of such trust may revoke or amend the whole or any part thereof by an instrument in writing acknowledged or proved in like manner, and thereupon the estate of the trustees ceases with respect to any part of such trust property, the disposition of which has been revoked. If the conveyance or other instrument creating a trust of property was recorded in the office of the clerk or register of any county of this state, the instrument revoking or amending such trust, together with the consents thereto, shall be recorded in the same office of every county in which the conveyance or other instrument creating such trust was recorded.

(b) For the purposes of this section, a disposition, contained in a trust created on or after September first, nineteen hundred fifty-one, in favor of a class of persons described only as the heirs, next of kin or distributees (or by any term of like import) of the creator of the trust does not create a beneficial interest in such persons.

(c) A testamentary or lifetime trust wholly benefitting one or more

charitable beneficiaries may be terminated as provided for by subparagraph two of paragraph (c) of section 8-1.1 of this chapter.

**§ 7-1.10 Provision by non-domiciliary creator as to law to govern trust**

(a) Whenever a person, not domiciled in this state, creates a trust which provides that it shall be governed by the laws of this state, such provision shall be given effect in determining the validity, effect and interpretation of the disposition in such trust of:

(1) Any trust property situated in this state at the time the trust is created.

(2) Personal property, wherever situated, if the trustee of the trust is a person residing, incorporated or authorized to do business in this state or a national bank having an office in this state.

**§ 7-1.11 Application of principal to creator of trust as reimbursement for taxes**

(a) Notwithstanding any contrary provision of law, the trustee of an express trust, unless otherwise provided in the disposing instrument, may, from time to time, pay from principal to the creator of such trust an amount equal to any income taxes on any portion of the trust principal with which he is charged.

(b) The provisions of this section do not apply to any trust by which a future estate is indefeasibly vested in the United States or a political subdivision for exclusively public purposes; a corporation organized exclusively for religious, charitable, scientific, literary or educational purposes, including the encouragement of art and the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, and no substantial part of the activities of which is carrying on propaganda or otherwise attempting to influence legislation; a trustee, or a fraternal society, order or association operating under the lodge system, provided the principal or income of such trust is to be used by such trustee or by such fraternal society, order or association exclusively for religious, charitable, scientific, literary or educational purposes, or for the prevention of cruelty to children or

animals, and no substantial part of the activities of such trustee or of such fraternal society, order or association is carrying on propaganda or otherwise attempting to influence legislation; or any veteran's organization incorporated by Act of Congress, or of its department or local chapters or posts, no part of the net earnings of which inures to the benefit of any private shareholder or individual.

**§ 7-1.12 Supplemental needs trusts established for persons with severe and chronic or persistent disabilities**

(a) Definitions: When used in this section, unless otherwise expressly stated or unless the context otherwise requires:

(1) "Developmental disability" means developmental disability as defined in subdivision twenty-two of section 1.03 of the mental hygiene law.

(2) "Government benefits or assistance" means any program of benefits or assistance which is intended to provide or pay for support, maintenance or health care and which is established or administered, in whole or in part, by any federal, state, county, city or other governmental entity.

(3) "Mental illness" means mental illness as defined in subdivision twenty of section 1.03 of the mental hygiene law.

(4) "Person with a severe and chronic or persistent disability" means a person (i) with mental illness, developmental disability, or other physical or mental impairment;

(ii) whose disability is expected to, or does, give rise to a long-term need for specialized health, mental health, developmental disabilities, social or other related services; and

(iii) who may need to rely on government benefits or assistance.

(5) "Supplemental needs trust" means a discretionary trust established for the benefit of a person with a severe and chronic or persistent disability (the "beneficiary") which conforms to all of the following criteria:

(i) The trust document clearly evidences the creator's intent to supplement, not supplant, impair or diminish, government benefits or assistance for which the beneficiary may otherwise be eligible or which the beneficiary may be receiving, except as provided in clause (ii) of

this subparagraph;

(ii) The trust document prohibits the trustee from expending or distributing trust assets in any way which may supplant, impair or diminish government benefits or assistance for which the beneficiary may otherwise be eligible or which the beneficiary may be receiving; provided, however, that the trustee may be authorized to make such distributions to third parties to meet the beneficiary's needs for food, clothing, shelter or health care but only if the trustee determines (A) that the beneficiary's basic needs will be better met if such distribution is made, and (B) that it is in the beneficiary's best interests to suffer the consequent effect, if any, on the beneficiary's eligibility for or receipt of government benefits or assistance;

(iii) The beneficiary does not have the power to assign, encumber, direct, distribute or authorize distributions from the trust;

(iv) If an inter vivos trust, the creator of the trust is a person or entity other than the beneficiary or the beneficiary's spouse; and

(v) Notwithstanding subparagraph (iv) of this paragraph, the beneficiary of a supplemental needs trust may be the creator of the trust if such trust meets the requirements of subparagraph two of paragraph (b) of subdivision two of section three hundred sixty-six of the social services law and of the regulations implementing such clauses. Provided, however, that if the trust is funded with the proceeds of retroactive payments made as a result of a court action and due the beneficiary under the federal supplemental security income program, as established under title XVI of the federal social security act, the creation of a supplemental needs trust by the beneficiary under this subparagraph shall not impair nor limit any right under applicable law of a representative payee to receive reimbursement out of such proceeds for expenses incurred on behalf of the beneficiary pending the determination of the beneficiary's eligibility for such federal supplemental security income program, nor any right under applicable law of any state or local governmental entity which provided the beneficiary with interim assistance pending the determination of the beneficiary's eligibility for such federal supplemental security income program to be repaid out of such proceeds for the amount of such interim assistance.

(6) A "beneficiary" means a person with a severe and chronic or persistent disability who is a beneficiary of a supplemental needs

trust.

(b) A supplemental needs trust shall be construed in accordance with the following:

(1) It shall be presumed that the creator of the trust intended that neither principal nor income be used to pay for any expense which would otherwise be paid by government benefits or assistance for which the beneficiary might otherwise be eligible or which the beneficiary might be receiving, notwithstanding any authority the trustee may have to make distributions for food, clothing, shelter or health care as provided in clause (ii) of subparagraph five of paragraph (a) of this section;

(2) Section 7-1.6 of this article shall not be applicable to the extent that the application or possible application of that section would reduce or eliminate the beneficiary's entitlement to government benefits or assistance;

(3) Neither principal nor income held in trust shall be deemed an available resource to the beneficiary under any program of government benefits or assistance; however, actual distributions from the trust may be considered to be income or resources of the beneficiary to the extent provided by the terms of any such program;

(4) The trustee of the trust shall not be deemed to be holding assets for the benefit of the beneficiary for purposes of section 43.03 of the mental hygiene law or section one hundred four of the social services law; and

(5) If the trust provides the trustee with the authority to make distributions for food, clothing, shelter or health care as provided in clause (ii) of subparagraph five of paragraph (a) of this section, and if the mere existence of that authority would, under the terms of any program of government benefits or assistance, result in the beneficiary's loss of government benefits or assistance, regardless of whether such authority were actually exercised, then:

(i) if the trust instrument expressly provides, such provision shall be null and void and the trustee's authority to make such distributions shall cease and shall be limited as otherwise provided; or

(ii) the trust shall no longer be treated as a supplemental needs trust under this section and the trust shall be construed, and the trust assets considered, without regard to the provisions of this section.

(c) (1) Paragraph (b) of this section shall not apply to the extent

that the trust is funded, directly or indirectly, by the beneficiary, except as provided in clause (v) of subparagraph five of paragraph (a) of this section, by someone with a legal obligation of support to the beneficiary, or by someone with another financial obligation to the beneficiary to the extent of such obligation, at the time the beneficiary is receiving or applying to receive:

(i) Government benefits or assistance for which an income and resource calculation is made; or

(ii) Services, care or assistance for which payment or reimbursement is or may be sought under section 43.03 of the mental hygiene law or section one hundred four of the social services law.

(2) To the extent that said paragraph (b) does not apply, the trust shall not be treated as a supplemental needs trust under this section, and the trust shall be construed, and the trust assets considered, without regard to the provisions of this section.

(d) The provisions of paragraph (b) of this section shall not apply to bar claims by government against persons with an interest in or under the trust other than the beneficiary.

(e) (1) The following language may be used as part of a trust instrument, but is not required, to qualify a trust as a supplemental needs trust:

1. The property shall be held, IN TRUST, for the benefit of \_\_\_\_\_ (hereinafter the "beneficiary") and shall be held, managed, invested and reinvested by the trustee, who shall collect the income therefrom and, after deducting all charges and expenses properly attributable thereto, shall, at any time and from time to time, apply for the benefit of the beneficiary, so much (even to the extent of the whole) of the net income and/or principal of this trust as the trustee shall deem advisable, in his or her sole and absolute discretion, subject to the limitations set forth below. The trustee shall add to the principal of such trust the balance of net income not so paid or applied.

2. It is the grantor's intent to create a supplemental needs trust which conforms to the provisions of section 7-1.12 of the New York estates, powers and trusts law. The grantor intends that the trust

assets be used to supplement, not supplant, impair or diminish, any benefits or assistance of any federal, state, county, city, or other governmental entity for which the beneficiary may otherwise be eligible or which the beneficiary may be receiving. Consistent with that intent, it is the grantor's desire that, before expending any amounts from the net income and/or principal of this trust, the trustee consider the availability of all benefits from government or private assistance programs for which the beneficiary may be eligible and that, where appropriate and to the extent possible, the trustee endeavor to maximize the collection of such benefits and to facilitate the distribution of such benefits for the benefit of the beneficiary.

3. None of the income or principal of this trust shall be applied in such a manner as to supplant, impair or diminish benefits or assistance of any federal, state, county, city, or other governmental entity for which the beneficiary may otherwise be eligible or which the beneficiary may be receiving.

4. The beneficiary does not have the power to assign, encumber, direct, distribute or authorize distributions from this trust.

(2) (i) If the creator elects, the following additional language may be used:

5. Notwithstanding the provisions of paragraphs two and three above, the trustee may make distributions to meet the beneficiary's need for food, clothing, shelter or health care even if such distributions may result in an impairment or diminution of the beneficiary's receipt or eligibility for government benefits or assistance but only if the trustee determines that (i) the beneficiary's needs will be better met if such distribution is made, and (ii) it is in the beneficiary's best interests to suffer the consequent effect, if any, on the beneficiary's eligibility for or receipt of government benefits or assistance.

(ii) If the trustee is provided with the authority to make the distributions as described in subparagraph (2) (i), the creator may elect to add the following clause:

; provided, however, that if the mere existence of the trustee's authority to make distributions pursuant to this paragraph shall result

in the beneficiary's loss of government benefits or assistance, regardless of whether such authority is actually exercised, this paragraph shall be null and void and the trustee's authority to make such distributions shall cease and shall be limited as provided in paragraphs two and three above, without exception.

(f) Nothing in this section shall affect the establishment, interpretation or construction of trust instruments which do not conform with the provisions of this section, nor shall this section impair the state's authority to be paid from or seek reimbursement from any trust which does not conform with the provisions of this section or to deem the principal or income of such trust an available resource under any program of government benefits or assistance.

#### **§ 7-1.13 Division of trusts and establishment of separate trusts**

(a) Notwithstanding any contrary provision of law, unless expressly prohibited by the terms of the disposing instrument:

(1) the trustee of an express trust (which term as defined in paragraph (g) of this section may mean the executor or administrator) is authorized without prior court approval or the consent of the persons interested to establish two or more separate trusts in order to segregate for any of the following purposes:

(A) property held in trust in which a spouse or surviving spouse has a qualifying income interest with respect to which an election has been or will be made in whole or in part under section 2056(b)(7), 2056A or 2523(f) of the United States Internal Revenue Code of 1986 from property with respect to which no election has been or will be made;

(B) property held in trust with respect to which a marital deduction under section 2056 or 2523 of the United States Internal Revenue Code would be available, by election or otherwise, from property held in trust for persons other than the spouse or surviving spouse, so that one or more of such separate trusts qualify for the deduction under said sections;

(C) property held in trust with respect to which a charitable deduction under section 2055 or 2522 of the United States Internal Revenue Code would be available from property held in trust for persons not described in said sections, so that one or more of such separate

trusts qualify for the deduction under said sections;

(D) property held in trust which is or would be excepted, excluded or exempt from or under Chapter 13 (tax on generation-skipping transfers) of the United States Internal Revenue Code from such property which is not so excepted, excluded or exempt, so that one or more of such separate trusts will have an inclusion ratio of zero, or so that one or more of such separate trusts qualify for the grandchild exception under section 1433(b)-(d) of the Tax Reform Act of 1986, as amended;

(E) property held in trust for one (of two or more beneficiaries) from property held in trust for such other beneficiaries, so that one or more of such separate trusts shall be a qualified subchapter S trust under section 1361(d) of the United States Internal Revenue Code;

(F) property transferred in trust by a creator (including but not limited to a transfer treated as made by a spouse by reason of section 2513 of the United States Internal Revenue Code) from property transferred in trust by one or more different creators; and

(G) property transferred in trust by a creator (including but not limited to a transfer treated as made by a spouse by reason of section 2513 of the United States Internal Revenue Code) pursuant to a disposing instrument from property transferred by the same creator pursuant to another disposing instrument;

(2) the trustee of an express trust may divide such trust into two or more separate trusts, with the consent of all persons interested in the trust but without prior court approval, for any reason which is not directly contrary to the primary purpose of the trust; and

(3) the court having jurisdiction of an express trust, upon the petition of the trustee or of any person interested in the trust and upon notice to all such persons, may direct the establishment of two or more separate trusts for any reason not directly contrary to the primary purpose of the trust.

(b) Unless the court otherwise directs, the trusts established under this section shall be deemed to have been established as of the effective date of the disposing instrument; provided that the establishment of separate trusts under subparagraph two of paragraph (a) of this section may become effective upon the date or dates provided in the instrument filed under paragraph (e) of this section.

(c) Except as implicit in the establishment of separate trusts

authorized by this section, the terms of the disposing instrument, subject to modifications approved by the court, shall govern each separate trust established hereunder, except that separate trusts for one or more members of a class of beneficiaries may be established under subparagraph two of paragraph (a) of this section without modification by the court if the property held in trust is distributed to such separate trusts for one or more members of such class on the basis of share per stirpes, per capita, or by representation, whichever is consistent with the terms of the disposing instrument.

(d) Unless the court otherwise directs, and except in the case of the establishment of separate trusts under clauses (F) and (G) of subparagraph one of paragraph (a) of this section where the original assets remain or can be traced, the property distributed to the separate trust shall be fairly representative of appreciation or depreciation and shall be based upon the fair market value of the assets on the date or dates of the distributions of such assets to the separate trusts.

(e) Separate trusts shall be established under subparagraphs one and two of paragraph (a) of this section by an instrument or instruments in writing, signed and acknowledged by the trustee and if under subparagraph two of paragraph (a) of this section shall also be signed and acknowledged by all the persons interested in the trust (or the guardian of the property, committee, conservator, adult guardian, or personal representative of such persons each of whom is hereby empowered to consent thereto without prior court approval). Such instruments shall be filed in the office of the clerk of the court having jurisdiction over the trust; and a copy thereof shall be served on all persons interested in the trusts (or the guardian of the property, committee, conservator, adult guardian, or personal representative of such persons), by registered or certified mail, return receipt requested, or by personal delivery or upon application of the trustee in any other manner directed by the court.

(f) The term "disposing instrument" shall mean the will, trust agreement, instrument exercising a power of appointment or other instrument creating such a trust or transferring property to such trust; provided that in the case of an instrument exercising a limited or testamentary power of appointment, the term "disposing instrument" may also refer to the instrument creating such power (if applicable under

the circumstances).

(g) In any case where the United States Internal Revenue Code requires that an election or other action be made or taken by the executor or if no trustee of a trust under a will has qualified, the term "trustee" as used in this section shall mean the executor or administrator of an estate. In any such case, the trustee shall comply with any action taken by the executor or administrator under this section.

(h) For the purposes of this section, the phrase "all persons interested in the trust" shall mean all the persons upon whom service of process would be required in a proceeding for the judicial settlement of the account of the trustee, taking into account section three hundred fifteen of the surrogate's court procedure act.

(i) References to sections of the United States Internal Revenue Code shall refer to the United States Internal Revenue Code of 1986 as amended from time to time, or to corresponding provisions of subsequent internal revenue laws, and shall also refer to corresponding provisions of state law.

(j) Unless otherwise provided for in the disposing instrument, the commissions allowed to a trustee as determined under article twenty-three of the surrogate's court procedure act, as amended from time to time, shall not be increased by reason of the establishment of separate trusts pursuant to subparagraph one of paragraph (a) of this section unless the court otherwise permits an increase, provided, however, that such trustee shall be entitled to charge the trust for any additional reasonable and necessary expenses incurred in the administration of such separate trusts.

(k) For purposes of subparagraphs (a)(2) and (3) of this section, a division of a trust into two or more separate trusts to permit one or more such trusts to be governed by article 11-A and another one or more such trusts to be governed by 11-2.4 shall be deemed to be for a reason which is not directly contrary to the primary purpose of the trust unless such division is expressly prohibited by the terms of the disposing instrument.

#### **§ 7-1.14 Who may make a lifetime trust**

Any person, as defined in 1-2.12, may by lifetime trust dispose of real and personal property. A natural person who creates a lifetime trust shall be eighteen years of age or older.

#### **§ 7-1.15 What property may be disposed of by lifetime trust**

Every estate in property may be disposed of by lifetime trust.

#### **§ 7-1.16 Revocation of lifetime trust by will**

A lifetime trust shall be irrevocable unless it expressly provides that it is revocable. In addition to the method set forth in 7-1.17, a revocable lifetime trust can be revoked or amended by an express direction in the creator's will which specifically refers to such lifetime trust or a particular provision thereof.

#### **§ 7-1.17 Execution, amendment and revocation of lifetime trusts**

(a) Every lifetime trust shall be in writing and shall be executed and acknowledged by the person establishing such trust and, unless such person is the sole trustee, by at least one trustee thereof, in the manner required by the laws of this state for the recording of a conveyance of real property or, in lieu thereof, executed in the presence of two witnesses who shall affix their signatures to the trust instrument.

(b) Any amendment or revocation authorized by the trust shall be in writing and executed by the person authorized to amend or revoke the trust, and except as otherwise provided in the governing instrument, shall be acknowledged or witnessed in the manner required by paragraph (a) of this section, and shall take effect as of the date of such execution. Written notice of such amendment or revocation shall be delivered to at least one other trustee within a reasonable time if the person executing such amendment or revocation is not the sole trustee, but failure to give such notice shall not affect the validity of the amendment or revocation or the date upon which same shall take effect.

No trustee shall be liable for any act reasonably taken in reliance on an existing trust instrument prior to actual receipt of notice of amendment or revocation thereof.

#### **§ 7-1.18 Funding of lifetime trust**

A lifetime trust shall be valid as to any assets therein to the extent the assets have been transferred to the trust. For purposes of this section, (a) transfer is not accomplished by recital of assignment, holding or receipt in the trust instrument, and (b) in the case of a trust of which the creator is the sole trustee, transfer shall mean in the case of assets capable of registration such as real estate, stocks, bonds, bank and brokerage accounts and the like, the recording of the deed or the completion of registration of the asset in the name of the trust or trustee, and in the case of other assets a written assignment describing the asset with particularity.

#### **§ 7-1.19 Application for termination of uneconomical trust**

(a) Notwithstanding sections 7-1.5 and 7-2.4 of this article or any other contrary provision of law:

(1) Any trustee or beneficiary of a lifetime or testamentary express trust (other than a wholly charitable trust) may, by application to the surrogate's court having jurisdiction over the trust, seek a termination of such trust when the expense of administering the trust is uneconomical.

(2) If, upon such application, the court finds that continuation of the trust is economically impracticable, that the express terms of the disposing instrument do not prohibit its early termination, and that such termination would not defeat the specified purpose of the trust and would be in the best interests of the beneficiaries, the court may make an order or decree terminating the trust and directing the distribution of the trust assets to and among those beneficiaries who at the time are entitled (or entitled in the discretion of the trustee) to the income and/or principal of the trust and those beneficiaries who would be entitled (or entitled in the discretion of the trustee) to the income

and/or principal of the trust if it were to terminate immediately before such order or decree. The distribution of the trust assets shall be made in such manner, proportions and shares as in the judgment of the court will effectuate the intention of the creator.

(b) Notice of the application shall be given to such persons and at such time and in such manner as the court, in its discretion, may direct.

(c) If the application or the possibility of the application of this section to any trust would reduce or eliminate a charitable deduction otherwise available to any person under the income tax, gift tax, estate tax or generation-skipping transfer tax provisions of the United States Internal Revenue Code, or the laws of any state of the United States or of the District of Columbia, this section shall not apply to such trust.

(d) This section shall not apply to a supplemental needs trust which conforms to the provisions of section 7-1.12 of this part.

## **PART 2. RULES GOVERNING TRUSTEES**

### **§ 7-2.1 Extent of trustee's estate**

(a) Except as otherwise provided in this article, an express trust vests in the trustee the legal estate, subject only to the execution of the trust, and the beneficiary does not take any legal estate in the property but may enforce the trust.

(b) This section does not prevent the creator of a trust from providing to whom the property shall belong in the event of the failure or termination of the trust or from disposing of the property subject to the execution of the trust. Such a transferee shall have a legal estate in the property as against all persons except the trustee and those lawfully claiming under him.

(c) A trust as described in sections 9-1.5, 9-1.6 and 9-1.7 of the estates, powers and trusts law, including a business trust as defined in subdivision two of section two of the general associations law, may acquire property in the name of the trust as such name is designated in the instrument creating said trust. Any property, so acquired can be conveyed, encumbered or otherwise disposed of only in such name by a

conveyance, encumbrance or other instrument executed by:

(1) the person or persons authorized by the instrument creating said trust; or

(2) the person or persons authorized by a resolution duly adopted by the trustees; or

(3) a majority of the trustees unless the instrument creating said trust otherwise provides.

Any instrument of conveyance, encumbrance or disposition delivered prior to the effective date of this section to or by a trust to which this section applies, in its trust name is hereby validated provided that no action or proceeding to cancel or disaffirm it shall be instituted within one year from the effective date hereof, but nothing herein contained shall affect any such pending action or proceeding.

#### **§ 7-2.2 When estate of trustee ceases**

When the purpose for which an express trust is created ceases, the estate of the trustee also ceases.

#### **§ 7-2.3 Trust estate not to descend on death of trustee; appointment, duties and rights of successor trustee**

(a) On the death of the sole surviving trustee of an express trust, the trust estate does not vest in his personal representative or pass to his distributees or devisees, but, in the absence of a contrary direction by the creator, if the trust has not been executed, the trust estate vests in the supreme court or the surrogate's court, as the case may be, and the trust shall be executed by a person appointed by the court.

(b) Upon such notice to the beneficiaries of the trust as the court may direct of an application for the appointment of a successor trustee, unless the creator has directed otherwise, the court may appoint a successor trustee, even though the trust has terminated, whenever in the opinion of the court such appointment is necessary for the effective administration and distribution of the trust estate, subject to the

following:

(1) A successor trustee shall give security in such amount as the court may direct.

(2) A successor trustee shall be subject to the same duties, as to accounting and trust administration, as are imposed by law on trustees and, in addition to the reasonable expenses incurred in the course of trust administration, shall be entitled to such commissions as may be fixed by any court having jurisdiction to pass upon such trustee's final account, which shall in no case exceed the commissions allowable by law to trustees.

#### **§ 7-2.4 Act of trustee in contravention of trust**

If the trust is expressed in the instrument creating the estate of the trustee, every sale, conveyance or other act of the trustee in contravention of the trust, except as authorized by this article and by any other provision of law, is void.

#### **§ 7-2.5 Suspension of powers of trustee in war service**

(a) Whenever a trustee of an express trust is engaged in war service, as defined in this section, such trustee or any other person interested in the trust estate may present a petition to the supreme court or the surrogate's court, as the case may be, to suspend the powers of such trustee while he is so engaged and until the further order of the court, and if the suspension of such trustee will leave no person acting as trustee or leave a beneficiary of such trust as the only acting trustee thereof, the petition must pray for the appointment of a successor trustee, unless a successor has been named in the trust instrument and is not engaged in war service or is not for any other reason unable or unwilling to act as such trustee.

(b) For the purposes of this section, a trustee is engaged in war service in any of the following cases:

(1) If he is a member of the armed forces of the United States or of any of its allies, or if he has been accepted for such service and is awaiting induction.

(2) If he is engaged in any work abroad in connection with a governmental agency of the United States or with the American Red Cross Society or any other body with similar objectives.

(3) If he is interned in any enemy country or is in a foreign country or a possession or dependency of the United States and is unable to return to this state.

(4) If he is a member of the Merchant Marine or similar service.

(c) Where the application is made by a trustee engaged in war service, notice shall be given to such persons and in such manner as the court may direct. Where the application is made by any other person interested in the trust estate and the trustee is in the armed forces of the United States, notice shall be given to such trustee in such manner as the court may direct. In every other case, where the application is made by a person other than the trustee, notice thereof shall be given to such persons and in such manner as the court may direct.

(d) Upon the filing of the petition and proof of service of notice prescribed in paragraph (c), the court may, notwithstanding any other provision of law, suspend the trustee engaged in war service from the exercise of all of his powers and duties while engaged in such service and until the further order of the court. The order may further provide that the remaining trustee or, if there is none, the successor named in the trust instrument or appointed by the court may exercise all of the powers and be subject to all of the duties of the original trustee.

(e) The successor trustee shall be limited to commissions as computed under SCPA 2308 or 2309, whichever is applicable, upon income received and disbursed and upon principal disbursed. Commissions may also be allowed under 2308 or 2309 upon rents if he is authorized or required to collect the rents of and manage real property. In case of the resignation or removal of the suspended trustee, or in the event of such trustee's death, the foregoing basis for computing the commissions shall not apply and his commissions shall be computed in the same manner as those of any other trustee.

(f) When the suspended trustee ceases to be engaged in war service he may, upon application to the court and upon such notice as the court may direct, be reinstated as trustee if any of the duties of such office remain unexecuted. If the suspended trustee is reinstated the court shall thereupon remove his successor and make such other order as

justice requires, but such removal shall not bar the successor from subsequently qualifying as a trustee if for any reason it thereafter becomes necessary to appoint a trustee.

#### **§ 7-2.6 Resignation, suspension or removal of trustee**

(a) Subject to the relevant provisions of the civil practice law and rules, the supreme court has power:

(1) On the application of a trustee, to accept his resignation and to discharge him on such terms as it deems proper.

(2) On the application of any person interested in the trust estate, to suspend or remove a trustee who has violated or threatens to violate his trust, who is insolvent or whose insolvency is imminent or apprehended or who for any reason is a person unsuitable to execute the trust.

(3) In case of the resignation or removal of a trustee, to appoint a successor trustee and, if there is no acting trustee, to cause the trust to be executed by a receiver or other officer under its direction. This section does not apply to a trust arising or resulting by implication of law, nor where other provision is made by law for the resignation, suspension or removal of a trustee or the appointment of a successor trustee.

#### **§ 7-2.7 Accounting by trustee in supreme court**

(a) Any proceeding for an accounting or other relief brought by a trustee or by a substituted or successor trustee may be commenced by such notice to the beneficiaries of the trust as the supreme court may direct.

(b) In case of the resignation, suspension or removal, pursuant to this article, of any trustee of a trust which includes real property and mortgage participation certificates held by more than one person and secured by a mortgage on real property or any estate therein, payment of which certificates is not guaranteed by the trustee or by any title or mortgage guaranty or investment company, the court in its discretion may dispense with a formal accounting by such trustee; but the trustee shall file with the court a statement of the condition of the trust and of the

security underlying such certificates as of the date of his resignation, suspension or removal and shall assign, transfer or convey all of the assets of the trust to the successor trustee or to the receiver or other officer appointed by the court, as the case may be.

#### **§ 7-2.8 Commissions of trustee to sell real property for benefit of creditors**

A trustee of a trust to sell real property for the benefit of creditors is entitled to the same commissions as an assignee for the benefit of creditors.

### **PART 3. RIGHTS OF PURCHASERS, CREDITORS AND OTHER PERSONS**

#### **§ 7-3.1 Disposition in trust for creator void as against creditors**

(a) A disposition in trust for the use of the creator is void as against the existing or subsequent creditors of the creator.

(b) (1) For purposes of paragraph (a) of this section, all trusts, custodial accounts, annuities, insurance contracts, monies, assets or interests established as part of, and all payments from, either an individual retirement account plan which is qualified under section 408 or section 408A of the United States Internal Revenue Code of 1986, as amended, or a Keogh (HR-10), retirement or other plan established by a corporation, which is qualified under section 401 of the United States Internal Revenue Code of 1986, as amended, shall not be considered a disposition in trust for the use of the creator, even though the creator is (i) in the case of an individual retirement account plan, an individual who is the settlor of and depositor to such account plan, or (ii) a self-employed individual, or (iii) a partner of the entity sponsoring the Keogh (HR-10) plan, or (iv) a shareholder of the corporation sponsoring the retirement or other plan.

(2) All trusts, custodial accounts, annuities, insurance contracts, monies, assets, or interests described in subparagraph one of this paragraph shall be conclusively presumed to be spendthrift trusts under

this section and the common law of the state of New York for all purposes, including, but not limited to, all cases arising under or related to a case arising under sections one hundred one to thirteen hundred thirty of title eleven of the United States Bankruptcy Code, as amended.

(3) This section shall not impair any rights an individual has under a qualified domestic relations order as that term is defined in section 414(p) of the United States Internal Revenue Code of 1986, as amended.

(4) Additions to an asset described in subparagraph one of this paragraph shall not be exempt from application to the satisfaction of a money judgment if (i) made after the date that is ninety days before the interposition of the claim on which such judgment was entered, or (ii) deemed to be voidable transactions under article ten of the debtor and creditor law.

(c) A provision in any trust, other than a testamentary trust or a trust which meets the requirements of subparagraph two of paragraph (b) of subdivision two of section three hundred sixty-six of the social services law and of the regulations implementing such clauses, which provides directly or indirectly for the suspension, termination or diversion of the principal, income or beneficial interest of either the creator or the creator's spouse in the event that the creator or creator's spouse should apply for medical assistance or require medical, hospital or nursing care or long term custodial, nursing or medical care shall be void as against the public policy of the state of New York, without regard to the irrevocability of the trust or the purpose for which the trust was created.

(d) A disposition in trust shall not be considered to be for the use of the creator under paragraph (a) of this section by reason of the trustee's authority to pay trust principal to the creator pursuant to section 7-1.11 of this article. Nor shall a disposition in trust be considered to be for the use of the creator under paragraph (a) of this section where the trustee is authorized under the trust instrument or any other provision of law to pay or reimburse the creator for any tax on trust income or trust principal that is payable by the creator under the law imposing such tax or to pay any such tax directly to the taxing authorities. No creditor of a trust creator shall be entitled to reach any trust property based on the discretionary powers described in this

paragraph.

### **§ 7-3.2 Bona fide purchasers and creditors protected**

An express trust not declared in the disposition to the trustee or an implied or resulting trust does not defeat the title of a purchaser from the trustee for value and without notice of the trust, or the rights of a creditor who extended credit to the trustee in reliance upon his apparent ownership of the trust property.

### **§ 7-3.3 Person paying money to the trustee protected**

A person who in good faith transfers money or property to a trustee is not responsible for the proper application of such money or property; and any right or title derived by him from the trustee in consideration of such transfer is not affected by the trustee's misapplication of such money or property.

### **§ 7-3.4 Excess income from trust property subject to creditors' claims**

Where a trust is created to receive the income from property and no valid direction for accumulation is given, the income in excess of the sum necessary for the education and support of the beneficiary is subject to the claims of his creditors in the same manner as other property which cannot be reached by execution.

### **§ 7-3.5 Rights of creditors to obtain information concerning beneficiaries**

(a) Any person who has furnished necessities to a beneficiary of any trust may apply to the court having jurisdiction of the trust for an order directing the trustee thereof to furnish to the applicant the true and full name and residence address of any such beneficiary. As used in this section, the term "necessaries" means goods furnished and services

performed suitable to the condition in life of the person to whom they are furnished or for whose benefit they are performed, and which meet his actual needs at the time such necessities are provided.

(b) The application shall be made by a verified petition which states (1) the name and address of petitioner, (2) the nature and extent of the necessities provided, (3) the person by whom and the circumstances under which they were provided, (4) the amount of the indebtedness claimed to exist, (5) the name of the person to whom or for whose benefit such necessities were provided, (6) a description of the trust of which the person to whom such necessities were provided is a beneficiary and (7) the name of the trustee administering such trust.

(c) Such petition shall also show the efforts made by the petitioner to locate the beneficiary and that more than ten days have elapsed since petitioner requested in writing that the trustee furnish the address of any such beneficiary. The petition may contain such other information as is relevant to the inquiry.

(d) The proceeding may be initiated by citation or order to show cause served on the trustee personally or in such manner and at such time as the court may direct. A copy of the petition shall be served with the process.

(e) Upon the return of the process the court, if satisfied that the allegations of the petition are true and that the petitioner is entitled to the relief sought, may make an order directing the trustee to furnish to petitioner the true and full name and residence address of any beneficiary to whom necessities were provided. The order may fix the time within which such name and address shall be furnished. Failure to comply with an order so made shall be punishable as a contempt of court.

## **PART 5. Bank Accounts in Trust Form**

### **§ 7-5.1 Definitions**

(a) A "beneficiary" is a person who is described by a depositor as a person for whom a trust account is established or maintained.

(b) A "depositor" is a person in whose name a trust account subject to this part is established or maintained.

(c) A "financial institution" is a bank, trust company, national banking association, savings bank, industrial bank, private banker, foreign banking corporation, federal savings and loan association, a savings institution chartered and supervised as a savings and loan or similar institution under federal law or the laws of a state, a federal credit union, or a credit union chartered and supervised under the laws of a state.

(d) A "trust account" includes a savings, share, certificate or deposit account in a financial institution established by a depositor describing himself as trustee for another, other than a depositor describing himself as acting under a will, trust instrument or other instrument, court order or decree.

## **§ 7-5.2 Terms of a trust account**

The funds in a trust account, which shall include any dividends or interest thereon, shall be trust funds subject to the following terms:

(1) The trust can be revoked, terminated or modified by the depositor during his lifetime only by means of, and to the extent of, withdrawals from or charges against the trust account made or authorized by the depositor or by a writing which specifically names the beneficiary and the financial institution. The writing shall be acknowledged or proved in the manner required to entitle conveyances of real property to be recorded, and shall be filed with the financial institution wherein the account is maintained.

(2) A trust can be revoked, terminated or modified by the depositor's will only by means of, and to the extent of, an express direction concerning such trust account, which must be described in the will as being in trust for a named beneficiary in a named financial institution. Where the depositor has more than one trust account for a particular beneficiary in a particular financial institution, such a direction will affect all such accounts, unless the direction is limited to one or more accounts specifically identified by account number in addition to the foregoing requirements. A testamentary revocation, termination or modification under this paragraph can be effected by express words of revocation, termination or modification, or by a specific bequest of the

trust account, or any part of it, to someone other than the beneficiary. A bequest of part of a trust account shall operate as a pro tanto revocation to the extent of the bequest.

(3) If the depositor survives the beneficiary, the trust shall terminate and title to the funds shall continue in the depositor free and clear of the trust.

(4) If the beneficiary survives the depositor, and the depositor's will contains no provision revoking, terminating or modifying the trust account under paragraph (2), the trust shall terminate and title to the funds shall vest in the beneficiary free and clear of the trust.

(5) If the beneficiary survives the depositor and the depositor's will contains language sufficient under paragraph two of this section, to revoke, terminate or modify the trust, in whole or in part, that part of the trust which is affected shall terminate and title to the funds shall be subject to disposition by the depositor's will, free and clear of the trust.

### **§ 7-5.3 Payment to beneficiary**

(a) If the beneficiary survives the depositor under the circumstances provided in paragraph four of section 7-5.2, the funds shall be paid to the beneficiary upon his order, if, at the time of his demand for payment of all or part of the funds, he is eighteen or more years of age.

(b) If the beneficiary survives the depositor under the circumstances provided in paragraph four of section 7-5.2, and if the beneficiary is under eighteen years of age at the time demand for payment of any part or all of the funds is made, the funds may be paid to the order of the parent or parents of the beneficiary to be held for the use and benefit of such infant beneficiary or to the order of the duly appointed guardian of the property of the beneficiary, if the funds are equal to or are less than ten thousand dollars; but if the funds are more than ten thousand dollars, the funds may be paid only to the order of the duly appointed guardian of the property of the beneficiary.

### **§ 7-5.4 Effect of payment**

A financial institution which, upon the death of a depositor and prior to service upon it of a restraining order, injunction or other appropriate process from a court of competent jurisdiction prohibiting payment, makes payment to a beneficiary or if the beneficiary is under eighteen years of age, to the guardian of the property or to the parent or parents of the infant beneficiary pursuant to section 7-5.3, shall, to the extent of such payment, be released from liability to any person claiming a right to the funds and the receipt or acquittance of the person to whom payment is made shall be a valid and sufficient release and discharge of the financial institution.

#### **§ 7-5.5 Rights not affected**

This part does not affect:

- (1) The rights of creditors of the depositor or his estate,
- (2) The rights of fiduciaries of the estate of the depositor, or
- (3) The rights of the surviving spouse of the depositor.

#### **§ 7-5.6 Joint depositors**

If a trust account is established in the names of more than one depositor, in form to be paid or delivered to any, or the survivor of them, in trust for another, such account shall be subject to the terms of this part, except that the title to the funds on deposit, as between the depositors, shall be governed by article XIII-E of the banking law.

#### **§ 7-5.7 Multiple beneficiaries**

(a) Whenever any proceeds of a trust account would pass pursuant to section 7-5.2 to two or more beneficiaries, such proceeds shall pass to such beneficiaries in equal proportions, unless the terms of the trust provide otherwise.

(b) Whenever any proceeds of a trust account would pass pursuant to section 7-5.2 to two or more beneficiaries, and one or more of the

beneficiaries predeceases the depositor, such proceeds shall pass to the surviving beneficiary or beneficiaries in equal proportions, unless the terms of the trust provide otherwise.

### **§ 7-5.8 Application**

This part shall apply to all funds in trust accounts, as defined in paragraph (d) of section 7-5.1, which are in existence on its effective date, except that its provisions shall not impair or defeat any rights which have accrued prior to such date.

## **PART 6.**

### **UNIFORM TRANSFERS TO MINORS ACT**

#### **Section**

- 7-6.1 Definitions.
- 7-6.2 Scope and jurisdiction.
- 7-6.3 Nomination of custodian.
- 7-6.4 Transfer by gift or exercise of power of appointment.
- 7-6.5 Transfer authorized by will or trust.
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- 7-6.19 Accounting by and determination of liability of custodian.

- 7-6.20 Termination of custodianship.
- 7-6.21 Age eighteen election.
- 7-6.22 Effect on existing custodianships.
- 7-6.23 Applicability.
- 7-6.24 Uniformity of application and construction.
- 7-6.25 Short title.
- 7-6.26 Severability.

## **§ 7-6.1 Definitions**

In this part:

- (a) "Adult" means an individual who has attained the age of twenty-one years.
- (b) "Benefit plan" means an employer's plan for the benefit of an employee or partner or an individual retirement account.
- (c) "Broker" means a person lawfully engaged in the business of effecting transactions in securities or commodities for the person's own account or for the account of others.
- (d) "Court" means the supreme court or the surrogate's court having jurisdiction over the minor.
- (e) "Custodial property" means (i) any interest in property transferred to a custodian under this part and (ii) the income from and proceeds of that interest in property.
- (f) "Custodian" means a person so designated under 7-6.9 or a successor or substitute custodian designated under 7-6.18.
- (g) "Financial institution" means a bank, trust company, savings institution, or credit union, chartered and supervised under state or federal law.
- (h) "Guardian" means a person appointed or qualified by a court to act as general, limited, or temporary guardian of a minor's property or a person legally authorized to perform substantially the same functions.
- (i) "Legal representative" means an individual's personal representative or guardian.
- (j) "Member of the minor's family" means any of the minor's parents, stepparents, spouse, grandparents, brothers, sisters, uncles, and aunts, whether of the whole blood or half blood or by or through legal

adoption.

(k) "Minor" means an individual who has not attained the age of twenty-one years.

(l) "Person" means an individual, corporation, organization, or other legal entity.

(m) "Personal representative" means a person who has received letters to administer the estate of a decedent or a person legally authorized to perform substantially the same functions.

(n) "State" includes any state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession subject to the legislative authority of the United States.

(o) "Transfer" means a transaction that creates custodial property under 7-6.9.

(p) "Transferor" means a person who makes a transfer under this part.

(q) "Trust company" means a financial institution, corporation, or other legal entity, authorized to exercise general trust powers in this state.

## **§ 7-6.2 Scope and jurisdiction**

(a) This part applies to a transfer that refers to this part in the designation under paragraph (a) of 7-6.9 by which the transfer is made if at the time of the transfer, the transferor, the minor, or the custodian is a resident of this state or the custodial property is located in this state. The custodianship so created remains subject to this part despite a subsequent change in residence of a transferor, the minor, or the custodian, or the removal of custodial property from this state.

(b) A person designated as custodian under this part is subject to personal jurisdiction in this state with respect to any matter relating to the custodianship.

(c) A transfer that purports to be made and which is valid under the Uniform Transfers to Minors Act, the Uniform Gifts to Minors Act, or a substantially similar act, of another state is governed by the law of the designated state and may be executed and is enforceable in this state if at the time of the transfer, the transferor, the minor, or the custodian is a resident of the designated state or the custodial

property is located in the designated state.

### **§ 7-6.3 Nomination of custodian**

(a) A person having the right to designate the recipient of property transferable upon the occurrence of a future event may revocably nominate a custodian to receive the property for a minor beneficiary upon the occurrence of the event by naming the custodian followed in substance by the words "as custodian for \_\_\_\_\_ (name of minor) under the New York Uniform Transfers to Minors Act." The nomination may name one or more persons as substitute custodians to whom the property must be transferred, in the order named, if the first nominated custodian dies before the transfer or is unable, declines, or is ineligible to serve. The nomination may be made in a will, a trust, a deed, an instrument exercising a power of appointment, or in a writing designating a beneficiary of contractual rights which is registered with or delivered to the payor, issuer, or other obligor of the contractual rights.

(b) A custodian nominated under this section must be a person to whom a transfer of property of that kind may be made under paragraph (a) of 7-6.9.

(c) The nomination of a custodian under this section does not create custodial property until the nominating instrument becomes irrevocable or a transfer to the nominated custodian is completed under 7-6.9. Unless the nomination of a custodian has been revoked, upon the occurrence of the future event the custodianship becomes effective and the custodian shall enforce a transfer of the custodial property pursuant to 7-6.9.

### **§ 7-6.4 Transfer by gift or exercise of power of appointment**

A person may make a transfer by irrevocable gift to, or the irrevocable exercise of a power of appointment in favor of, a custodian for the benefit of a minor pursuant to 7-6.9.

### **§ 7-6.5 Transfer authorized by will or trust**

(a) A personal representative or trustee may make an irrevocable transfer pursuant to 7-6.9 to a custodian for the benefit of a minor as authorized in the governing will or trust.

(b) If the testator or settler has nominated a custodian under 7-6.3 to receive the custodial property, the transfer must be made to that person.

(c) If the testator or settler has not nominated a custodian under 7-6.3, or all persons so nominated as custodian die before the transfer or are unable, decline, or are ineligible to serve, the personal representative or the trustee, as the case may be, shall designate the custodian from among those eligible to serve as custodian for property of that kind under paragraph (a) of 7-6.9.

### **§ 7-6.6 Other transfer by fiduciary**

(a) Subject to paragraph (c), a personal representative or trustee may make an irrevocable transfer to another adult or trust company as custodian for the benefit of a minor pursuant to 7-6.9, in the absence of a will or under a will or trust that does not contain an authorization to do so.

(b) Subject to paragraph (c), a guardian may make an irrevocable transfer to another adult or trust company as custodian for the benefit of the minor pursuant to 7-6.9.

(c) A transfer under paragraph (a) or (b) may be made only if (i) the personal representative, trustee, or guardian considers the transfer to be in the best interest of the minor, (ii) the transfer is not prohibited by or inconsistent with provisions of the applicable will, trust agreement, or other governing instrument, and (iii) if the personal representative is acting in the absence of a will, the transfer is authorized by the court if it exceeds fifty thousand dollars in value.

### **§ 7-6.7 Transfer by obligor**

(a) Subject to paragraphs (b) and (c), a person not subject to 7-6.5 or 7-6.6 who holds property of or owes a liquidated debt to a minor not

having a guardian may make an irrevocable transfer to a custodian for the benefit of the minor pursuant to 7-6.9.

(b) If a person having the right to do so under 7-6.3 has nominated a custodian under that section to receive the custodial property, the transfer must be made to that person.

(c) If no custodian has been nominated under 7-6.3, or all persons so nominated as custodian die before the transfer or are unable, decline, or are ineligible to serve, a transfer under this section may be made to an adult member of the minor's family, unless the property exceeds fifty thousand dollars in value, or to a trust company.

### **§ 7-6.8 Receipt for custodial property**

A written acknowledgement of delivery by a custodian constitutes a sufficient receipt and discharge for custodial property transferred to a custodian pursuant to this part.

### **§ 7-6.9 Manner of creating custodial property and effecting transfer; designation of initial custodian; control**

(a) Custodial property is created and a transfer is made whenever:

(1) an uncertificated security or certificated security in registered form is either:

(i) registered in the name of the transferor, an adult other than the transferor, or a trust company, followed in substance by the words: "as custodian for \_\_\_\_\_ (name of minor) under the New York Uniform Transfers to Minors Act"; or

(ii) delivered, if in certificated form, or any document necessary for the transfer of an uncertificated security is delivered, together with any necessary endorsement, to an adult other than the transferor or to a trust company, as custodian, accompanied by an instrument in substantially the form set forth in paragraph (b);

(2) money is paid or delivered, or a security held in the name of a broker, financial institution, or its nominee is transferred, to a broker or financial institution for credit to an account in the name of the transferor, an adult other than the transferor, or a trust company,

followed in substance by the words: "as custodian for \_\_\_\_\_ (name of minor) under the New York Uniform Transfers to Minors Act";

(3) the ownership of a life or endowment insurance policy or annuity contract is either:

(i) registered with the issuer in the name of the transferor, an adult other than the transferor, or a trust company, followed in substance by the words: "as custodian for \_\_\_\_\_ (name of minor) under the New York Uniform Transfers to Minors Act"; or

(ii) assigned in a writing delivered to an adult other than the transferor, or to a trust company whose name in the assignment is followed in substance by the words: "as custodian for \_\_\_\_\_ (name of minor) under the New York Uniform Transfers to Minors Act";

(4) an irrevocable exercise of a power of appointment or an irrevocable present right to future payment under a contract is the subject of a written notification delivered to the payor, issuer, or other obligor that the right is transferred to the transferor, an adult other than the transferor, or a trust company, whose name in the notification is followed in substance by the words: "as custodian for \_\_\_\_\_ (name of minor) under the New York Uniform Transfers to Minors Act";

(5) an interest in real property is recorded in the name of the transferor, an adult other than the transferor, or a trust company, followed in substance by the words: "as custodian for \_\_\_\_\_ (name of minor) under the New York Uniform Transfers to Minors Act";

(6) a certificate of title issued by a department or agency of a state or of the United States which evidences title to tangible personal property is either:

(i) issued in the name of the transferor, an adult other than the transferor, or a trust company, followed in substance by the words: "as custodian for \_\_\_\_\_ (name of minor) under the New York Uniform Transfers to Minors Act"; or

(ii) delivered to an adult other than the transferor or to a trust company, endorsed to that person followed in substance by the words: "as custodian for \_\_\_\_\_ (name of minor) under the New York Uniform Transfers to Minors Act"; or

(7) an interest in any property not described in subparagraphs (1) through (6) is transferred to an adult other than the transferor or to a trust company by a written instrument in substantially the form set forth in paragraph (b).

(b) An instrument in the following form satisfies the requirements of clause (ii) of subparagraph (1) and subparagraph (7) of paragraph (a):

"TRANSFER UNDER THE NEW YORK UNIFORM  
TRANSFERS TO MINORS ACT

I, \_\_\_\_\_ (name of transferor or name and representative capacity if a fiduciary) hereby transfer to \_\_\_\_\_ (name of custodian), as custodian for \_\_\_\_\_ (name of minor) under the New York Uniform Transfers to Minors Act, the following: (insert a description of the custodial property sufficient to identify it).

Dated: \_\_\_\_\_

\_\_\_\_\_  
(Signature)

\_\_\_\_\_ (name of custodian) acknowledges receipt of the property described above as custodian for the minor named above under the New York Uniform Transfers to Minors Act.

Dated: \_\_\_\_\_

\_\_\_\_\_  
(Signature of Custodian)

(c) A transferor shall place the custodian in control of the custodial property as soon as practicable.

### **§ 7-6.10 Single custodianship**

A transfer may be made only for one minor, and only one person may be the custodian. All custodial property held under this part by the same custodian for the benefit of the same minor constitutes a single custodianship.

### **§ 7-6.11 Validity and effect of transfer**

(a) The validity of a transfer made in a manner prescribed in this

part is not affected by:

(1) The failure of the transferor to comply with paragraph (c) of 7-6.9 concerning possession and control;

(2) designation of an ineligible custodian, except designation of the transferor in the case of property for which the transferor is ineligible to serve as custodian under paragraph (a) of 7-6.9; or

(3) death or incapacity of a person nominated under 7-6.3 or designated under 7-6.9 as custodian or the disclaimer of the office by that person.

(b) A transfer made pursuant to 7-6.9 is irrevocable, and the custodial property is indefeasibly vested in the minor, but the custodian has all the rights, powers, duties, and authority provided in this part, and neither the minor nor the minor's legal representative has any right, power, duty, or authority with respect to the custodial property except as provided in this part.

(c) By making a transfer, the transferor incorporates in the disposition all the provisions of this part and grants to the custodian, and to any third person dealing with a person designated as custodian, the respective powers, rights, and immunities provided in this part.

#### **§ 7-6.12 Care of custodial property**

(a) A custodian shall:

(1) take control of custodial property;

(2) register or record title to custodial property if appropriate; and

(3) collect, hold, manage, invest, and reinvest custodial property.

(b) In dealing with custodial property, a custodian shall observe the standard of care that would be observed by a prudent person dealing with property of another and is not limited by any other statute restricting investments by fiduciaries and is specifically authorized to delegate investment and management functions in the manner of a trustee as provided in section 11-2.3. If a custodian has a special skill or expertise or is named custodian on the basis of representations of a special skill or expertise, the custodian shall use that skill or expertise. However, a custodian, in the custodian's discretion and without liability to the minor or the minor's estate, may retain any custodial property received from a transferor.

(c) A custodian may invest in or pay premiums on life insurance or endowment policies on (1) the life of the minor only if the minor or the minor's estate is the sole beneficiary, or (2) the life of another person in whom the minor has an insurable interest only to the extent that the minor, the minor's estate, or the custodian in the capacity of custodian, is the irrevocable beneficiary.

(d) A custodian at all times shall keep custodial property separate and distinct from all other property in a manner sufficient to identify it clearly as custodial property of the minor. Custodial property consisting of certificated securities may be held on deposit at a stock brokerage firm or a financial institution registered in a street name or nominee name. Custodial property consisting of an undivided interest is so identified if the minor's interest is held as a tenant in common and is fixed. Custodial property subject to recordation is so identified if it is recorded, and custodial property subject to registration is so identified if it is either registered, or held in an account designated, in the name of the custodian, followed in substance by the words: "as a custodian for \_\_\_\_\_ (name of minor) under the New York Uniform Transfers to Minors Act."

(e) A custodian shall keep records of all transactions with respect to custodial property, including information necessary for the preparation of the minor's tax returns, and shall make them available for inspection at reasonable intervals by a parent or legal representative of the minor or by the minor if the minor has attained the age of fourteen years.

#### **§ 7-6.13 Powers of custodian**

(a) A custodian, acting in a custodial capacity, has all the rights, powers, and authority over custodial property that unmarried adult owners have over their own property, but a custodian may exercise those rights, powers, and authority in that capacity only.

(b) This section does not relieve a custodian from liability for breach of 7-6.12.

#### **§ 7-6.14 Use of custodial property**

(a) A custodian may deliver or pay to the minor or expend for the

minor's benefit so much of the custodial property as the custodian considers advisable for the use and benefit of the minor, without court order and without regard to (1) the duty or ability of the custodian personally or of any other person to support the minor, or (2) any other income or property of the minor which may be applicable or available for the support of the minor.

(b) On petition of an interested person or the minor if the minor has attained the age of fourteen years, the court may order the custodian to deliver or pay to the minor or expend for the minor's benefit so much of the custodial property as the court considers advisable for the use and benefit of the minor.

(c) A delivery, payment, or expenditure under this section is in addition to, not in substitution for, and does not affect any obligation of a person to support the minor.

#### **§ 7-6.15 Custodian's expenses, compensation, and bond**

(a) A custodian is entitled to reimbursement from custodial property for reasonable expenses incurred in the performance of the custodian's duties.

(b) Except for one who is a transferor under 7-6.4, a custodian has an election during each calendar year to charge reasonable compensation for services performed during that year. A custodian's election to charge reasonable compensation for a calendar year must be exercised during the calendar year.

(c) Except as provided in paragraph (f) of 7-6.18, a custodian shall not be required to give a bond.

#### **§ 7-6.16 Exemption of third person from liability**

A third person in good faith and without court order may act on the instructions of or otherwise deal with any person purporting to make a transfer or purporting to act in the capacity of a custodian and, in the absence of knowledge, is not responsible for determining:

- (a) the validity of the purported custodian's designation;
- (b) the propriety of, or the authority under this part for, any act of

the purported custodian;

(c) the validity or propriety under this part of any instrument or instructions executed or given either by the person purporting to make a transfer or by the purported custodian; or

(d) the propriety of the application of any property of the minor delivered to the purported custodian.

#### **§ 7-6.17 Liability to third persons**

(a) A claim based on (1) a contract entered into by a custodian acting in a custodial capacity, (2) an obligation arising from the ownership or control of custodial property, or (3) a tort committed during the custodianship, may be asserted against the custodial property by proceeding against the custodian in the custodial capacity, whether or not the custodian or the minor is personally liable therefor.

(b) A custodian is not personally liable:

(1) on a contract properly entered into in the custodial capacity unless the custodian fails to reveal that capacity and to identify the custodianship in the contract; or

(2) for an obligation arising from control of custodial property or for a tort committed during the custodianship unless the custodian is personally at fault.

(c) A minor is not personally liable for an obligation arising from ownership of custodial property or for a tort committed during the custodianship unless the minor is personally at fault.

#### **§ 7-6.18 Renunciation, resignation, death, or removal of custodian; designation of successor custodian**

(a) A person nominated under 7-6.3 or designated under 7-6.9 as custodian may decline to serve by delivering a valid disclaimer to the person who made the nomination or to the transferor or the transferor's legal representative. If the event giving rise to a transfer has not occurred and no substitute custodian able, willing, and eligible to serve was nominated under 7-6.3, the person who made the nomination may nominate a substitute custodian under 7-6.3; otherwise the transferor or the transferor's legal representative shall designate a substitute

custodian at the time of the transfer, in either case from among the persons eligible to serve as custodian for that kind of property under paragraph (a) of 7-6.9. The custodian so designated has the rights of a successor custodian.

(b) A custodian at any time may designate a trust company or an adult other than a transferor under 7-6.4 as successor custodian by executing and dating an instrument of designation before a subscribing witness other than the successor. If the instrument of designation does not contain or is not accompanied by the resignation of the custodian, the designation of the successor does not take effect until the custodian resigns, dies, become incapacitated, or is removed. The transferor may designate one or more persons as successor custodian to serve in the designated order of priority, in case the custodian originally designated or a prior successor custodian is unable, declines, or is ineligible to serve or resigns, dies, becomes incapacitated, or is removed.

The designation either (1) shall be made in the same transaction and by the same document by which the transfer is made, or (2) shall be made by executing and dating a separate instrument of designation before a subscribing witness other than a successor as a part of the same transaction and contemporaneously with the execution of the document by which the transfer is made. The designation is made by setting forth the successor custodian's name, followed in substance by the words: "is designated successor custodian." A successor custodian designated by the transferor may be a trust company or an adult other than the transferor. A successor custodian effectively designated by the transferor has priority over a successor custodian designated by a custodian.

(c) A custodian may resign at any time by delivering written notice to the minor if the minor has attained the age of fourteen years and to the successor custodian and by delivering the custodial property to the successor custodian.

(d) If the transferor has not effectively designated one or more successor custodians and a custodian is ineligible, dies, or becomes incapacitated without having effectively designated a successor and the minor has attained the age of fourteen years, the minor may designate as successor custodian, in the manner prescribed in paragraph (b), an adult

member of the minor's family, a guardian of the minor, or a trust company. If the minor has not attained the age of fourteen years or fails to act within sixty days after the ineligibility, death, or incapacity, the guardian of the minor becomes successor custodian. If the minor has no guardian or the guardian declines to act, the transferor, the legal representative of the transferor or of the custodian, an adult member of the minor's family, or any other interested person may petition the court to designate a successor custodian.

(e) A custodian who declines to serve under paragraph (a) or resigns under paragraph (c), or the legal representative of a deceased or incapacitated custodian, as soon as practicable, shall put the custodial property and records in the possession and control of the successor custodian. The successor custodian by action may enforce the obligation to deliver custodial property and records and becomes responsible for each item as received.

(f) A transferor, the legal representative of a transferor, an adult member of the minor's family, a guardian of the minor, or the minor if the minor has attained the age of fourteen years may petition the court to remove the custodian for cause and to designate a successor custodian other than a transferor under 7-6.4 or to require the custodian to give appropriate bond.

#### **§ 7-6.19 Accounting by and determination of liability of custodian**

(a) A minor who has attained the age of fourteen years, the minor's guardian or legal representative, an adult member of the minor's family, a transferor, or a transferor's legal representative may petition the court (1) for an accounting by the custodian or the custodian's legal representative; or (2) for a determination of responsibility, as between the custodial property and the custodian personally, for claims against the custodial property unless the responsibility has been adjudicated in an action under 7-6.17 to which the minor or the minor's legal representative was a party.

(b) A successor custodian may petition the court for an accounting by the predecessor custodian.

(c) The court, in a proceeding under this part or in any other

proceeding, may require or permit the custodian or the custodian's legal representative to account.

(d) If a custodian is removed under paragraph (f) of 7-6.18, the court shall require an accounting and order delivery of the custodial property and records to the successor custodian and the execution of all instruments required for transfer of the custodial property.

#### **§ 7-6.20 Termination of custodianship**

The custodian shall transfer in an appropriate manner the custodial property to the minor or to the minor's estate upon the earlier of:

(a) the minor's attainment of twenty-one years of age with respect to custodial property transferred under 7-6.4 or 7-6.5;

(b) the minor's attainment of age eighteen or other statutory age of majority of New York with respect to custodial property transferred under 7-6.6 or 7-6.7; or

(c) the minor's death.

#### **§ 7-6.21 Age eighteen election**

Notwithstanding the foregoing sections of this part, if with respect to any gift made pursuant to 7-6.9, the designations of the custodian contains, in substance, the phrase, "until age eighteen", then all records of the custodian with respect to such gift shall contain such phrase, and the gift shall be administered under this part as if the word "eighteen" were substituted for the word "twenty-one" wherever such word appears in paragraphs (a) and (k) of section 7-6.1 and in section 7-6.20.

#### **§ 7-6.22 Effect on existing custodianships**

(a) Any transfer of custodial property made before January first, nineteen hundred ninety-seven is validated notwithstanding that there was no specific authority in part 4 of this article for the coverage of custodial property of that kind or for a transfer from that source at

the time the transfer was made.

(b) All accounts established under part 4 of this article and in existence on January first, nineteen hundred ninety-seven shall be governed by the provisions of this part except insofar as such application impairs constitutionally vested rights. Notwithstanding the provisions of this paragraph, the age of termination in effect prior to January first, nineteen hundred ninety-seven shall remain in effect with respect to such accounts, including any additions made after December thirty-first, nineteen hundred ninety-six.

(c) To the extent that this part, by virtue of paragraph (b) of this section, does not apply to transfers made in a manner prescribed in part 4 of this article or to the powers, duties, and immunities conferred by transfers in that manner upon custodians and persons dealing with custodians, the repeal of part 4 of this article shall not affect those transfers or those powers, duties, and immunities.

#### **§ 7-6.23 Applicability**

This part applies to a transfer within the scope of 7-6.2 made on or after January first, nineteen hundred ninety-seven if:

(a) the transfer purports to have been made under the New York Uniform Gifts to Minor Act; or

(b) the instrument by which the transfer purports to have been made uses in substance the designation "as custodian under the Uniform Gifts to Minors Act" or "as custodian under the Uniform Transfers to Minors Act" of any other state, and the application of this part is necessary to validate the transfer.

#### **§ 7-6.24 Uniformity of application and construction**

This part shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this part among states enacting it.

## **§ 7-6.25 Short title**

This part may be cited as "The New York Uniform Transfers to Minors Act."

## **§ 7-6.26 Severability**

If any provisions of this part or its application to any person or circumstances is held invalid, the invalidity does not affect other provisions or applications of this part which can be given effect without the invalid provision or application, and to this end provisions of this part are severable.

# **PART 7. CHILD PERFORMER TRUST ACCOUNT**

Section 7-7.1 Child performer trust account.

## **§ 7-7.1 Child performer trust account**

1. Scope. This section applies to contracts pursuant to which a child performer:

(a) is employed or agrees to render artistic or creative services for a fee, either directly or through a third-party individual or personal services corporation (loan-out company), or through an agency or service that provides artistic or creative services (casting agency); and

(b) agrees to purchase, or otherwise secure, sell, lease, or otherwise dispose of literary, musical, or dramatic properties, or use of a person's likeness, voice recording, performance, or story of or incidents in his or her life, either tangible or intangible, or any other rights therein for use in motion pictures, television, the production of sound recordings in any format now known or hereafter devised, the legitimate or living stage, or otherwise in the entertainment field.

2. Establishment of child performer trust account. (a) Employer.

Within thirty days following the final day of employment, except when the performance contract is a period longer than thirty days, a child performer's employer is required to transfer fifteen percent of gross earnings to the custodian of the child performer's child performer trust account. When the employment is longer than thirty days, the employer shall make the required transfer every payroll period. Transfers must conform with part six of this article. The use of an instrument to make the transfer which substantially conforms with section 7-6.9 is sufficient. If the child performer's employer has not been notified within fifteen days of the commencement of employment of the existence of a child performer trust account, or no such account has been established, then the child performer's employer shall transfer such monies together with the child performer's name and last known address to the state comptroller for placement into the child performer's holding fund established in section ninety-nine-k of the state finance law and such monies shall be administered by the state comptroller. Once transfers have been made to the child performer's trust account or the child performer's holding fund, as required by this subdivision, the child performer's employer has no further duty under this section.

(b) Custodian and guardian. Within fifteen days of the commencement of employment the child performer's guardian or custodian must establish a child performer trust account in accordance with part six of this article, unless an account has previously been established. Once the child performer trust account has been established the child performer's guardian or custodian shall notify the child performer's employer of the existence of the account and any additional information required to make transfers. The custodian of the account shall promptly notify the child performer's employer of any change in facts which affect the employer's obligation to set aside funds under this section. Upon request of the parent, legal guardian or the child performer's guardian ad litem, the custodian may require the child performer's employer to transfer more than fifteen percent of the gross earnings to the child performer trust account. The child performer's parent or legal guardian may serve as custodian. Once the child performer trust account balance reaches two hundred fifty thousand dollars or more a trust company shall be appointed as custodian of the account.

(c) Termination of child performer trust account. The child performer

may terminate the child performer trust account upon reaching the age of eighteen.

3. Standard for child performer trust accounts. Custodian management of funds which are required to be placed into a child performer trust account shall be subject to part six of this article, in all respects except as provided in this section.

## **PART 8. HONORARY TRUSTS FOR PETS**

### **7-8.1 Trusts for pets**

#### **§ 7-8.1 Trusts for pets**

(a) A trust for the care of a designated domestic or pet animal is valid. The intended use of the principal or income may be enforced by an individual designated for that purpose in the trust instrument or, if none, by an individual appointed by a court upon application to it by an individual, or by a trustee. Such trust shall terminate when the living animal beneficiary or beneficiaries of such trust are no longer alive.

(b) Except as expressly provided otherwise in the trust instrument, no portion of the principal or income may be converted to the use of the trustee or to any use other than for the benefit of all covered animals.

(c) Upon termination, the trustee shall transfer the unexpended trust property as directed in the trust instrument or, if there are no such directions in the trust instrument, the property shall pass to the estate of the grantor.

(d) A court may reduce the amount of the property transferred if it determines that amount substantially exceeds the amount required for the intended use. The amount of the reduction, if any, passes as unexpended trust property pursuant to paragraph (c) of this section.

(e) If no trustee is designated or no designated trustee is willing or able to serve, a court shall appoint a trustee and may make such other orders and determinations as are advisable to carry out the intent of the transferor and the purpose of this section.

## ARTICLE 8

### CHARITABLE TRUSTS

#### PART 1. RULES GOVERNING CHARITABLE TRUSTS

Section 8-1.1 Disposition of property for charitable purposes.

8-1.2 Certain charitable trusts authorized.

8-1.3 Certain charitable trusts regulated.

8-1.4 Supervision of trustees for charitable purposes.

8-1.5 Trusts for cemetery purposes.

8-1.6 Deposit of money in trust by owner of lots in private  
unincorporated cemetery.

8-1.7 Authority of trustee to accumulate income.

8-1.8 Private foundations: administration of certain trusts as  
defined in the United States internal revenue code of  
1954.

8-1.9 Trust governance.

#### PART 1. RULES GOVERNING CHARITABLE TRUSTS

##### **§ 8-1.1 Disposition of property for charitable purposes**

(a) No disposition of property for religious, charitable, educational or benevolent purposes, otherwise valid under the laws of this state, is invalid by reason of the indefiniteness or uncertainty of the persons designated as beneficiaries. If a trustee is named in the disposing instrument, legal title to the property transferred for such a purpose vests in such trustee; if no person is named as trustee, title vests in the court having jurisdiction over the trust.

(b) No disposition of property made in a will, executed and attested as prescribed by law, is invalid by reason of the incorporation by reference in the will of any existing written resolution, declaration or deed of trust, identified in such will and made or adopted by any corporation authorized by law to execute or accept trusts, to assist, encourage and promote the well-being and well-doing of mankind in general or the inhabitants of any community in particular; provided that a copy of such resolution, declaration or deed of trust, certified, under its corporate seal, by the secretary or assistant secretary or the

cashier or assistant cashier of such corporation, is filed for record in the office of the secretary of state and in the office of the clerk or register of the county of the corporation's principal place of business, in which the conveyances of real property are required by law to be filed for record, the secretary of state and the officer in charge of such record office being hereby authorized and directed to receive and record such resolution, declaration or deed of trust upon payment of the fees provided by law. Any such testamentary disposition to a corporation for the religious, charitable, educational or benevolent purposes set forth in such resolution, declaration or deed of trust is effective although the terms, conditions and purposes of such disposition are established only through such reference in the will.

(c) (1) The supreme court and, where the disposition is made by will, the surrogate's court in which such will is probated have jurisdiction over dispositions referred to and authorized by paragraphs (a) and (b), and whenever it appears to such court that circumstances have so changed since the execution of an instrument making a disposition for religious, charitable, educational or benevolent purposes as to render impracticable or impossible a literal compliance with the terms of such disposition, the court may, on application of the trustee or of the person having custody of the property subject to the disposition and on such notice as the court may direct, make an order or decree directing that such disposition be administered and applied in such manner as in the judgment of the court will most effectively accomplish its general purposes, free from any specific restriction, limitation or direction contained therein; provided, however, that any such order or decree is effective only with the consent of the creator of the disposition if he is living.

(2) (i) The attorney general or any trustee or beneficiary of a testamentary or lifetime trust wholly benefitting one or more charitable beneficiaries may petition a court of competent jurisdiction, on notice to the attorney general and all parties interested in the trust, seeking a termination of such trust when the trust is comprised of assets, the market value of which is one hundred thousand dollars or less and the expense of administering the trust is uneconomic when considered relative to income. When the court finds upon such application that continuation of the trust is economically impracticable or is not in the

best interests of the beneficiaries, the court shall make an order or decree terminating the trust and directing the distribution of the trust assets to accomplish its charitable purposes, provided, however, that if the trust is one for the benefit of a particular charitable beneficiary or beneficiaries named therein, the court shall direct the distribution of the trust assets to such named charitable beneficiary or beneficiaries, and provided further that no such proceeding may be instituted without the consent of the creator of the disposition if he is living.

(ii) For purposes of this paragraph, the term "charitable beneficiary" shall mean the beneficiary of a disposition for a religious, charitable, educational or benevolent purpose.

(d) The power of the supreme court or the surrogate's court, as provided in paragraph (c), to prevent the failure of, and to give effect to dispositions for religious, charitable, educational or benevolent purposes is not defeated by the circumstance that the beneficiary of any such disposition does not exist or, if in existence, lacks capacity to take such disposition at the time it would otherwise become effective, whether or not the disposition creates an express trust to effectuate its purposes.

(e) Any accumulation of income from property subject to a disposition in trust for a religious, charitable, educational or benevolent purpose, or otherwise acquired by such trust, shall in all respects, including its reasonableness, amount and duration, be within the jurisdiction of the supreme court or the surrogate's court, as the case may be. In exercising such jurisdiction, (1) any accumulation of income which might otherwise be applied for the purposes of the trust may be prohibited or limited, despite a valid direction therefor in the trust instrument or authority therefor under 8-1.7 and (2) such an accumulation may be authorized by order of the court despite the absence of a direction therefor in the trust instrument. This paragraph shall not restrict in any manner the ability to release or modify restrictions relating to institutional funds under section 555 of the not-for-profit corporation law.

(f) The attorney general shall represent the beneficiaries of such dispositions for religious, charitable, educational or benevolent purposes and it shall be his duty to enforce the rights of such

beneficiaries by appropriate proceedings in the courts.

(g) The supreme court or the surrogate's court, as the case may be, may authorize the trustee or any person holding title thereto to sell, mortgage or lease any real property which is the subject of a disposition for a religious, charitable, educational or benevolent purpose, whenever it appears to the satisfaction of the court that such real property, or any part thereof, has become or is likely to become unproductive, has depreciated or is likely to depreciate in value, that it is advisable to raise money to improve or erect buildings upon property so held or that it is expedient for any other reason that such real property be sold, mortgaged or leased. This paragraph shall not restrict in any manner the powers or rights any trustee may have by law or by the terms of any disposition of such real property. The provisions of this paragraph shall not apply to any corporation which is subject to sections 509 through 511 of the not-for-profit corporation law.

(h) The supreme court or the surrogate's court shall not make an order or decree under paragraph (g) unless it appears that eight days written notice, stating the time and place of the application for such order or decree, has been served upon the attorney general, who shall represent the state, the beneficiaries of any trust and the persons who might benefit from the religious, charitable, educational or benevolent purpose for which the real property, which is the subject of the application, is held. A like eight days notice of such application shall be given to any adult within the state who has a vested or contingent future estate in such real property and to any minor, incompetent, conservatee or absentee who is interested in such property, in such manner as the court may direct. Before making a final order or decree, the court shall appoint a guardian ad litem for any minor who is not represented by a guardian or parent, for any incompetent who is not represented by a committee, and for any absentee.

(i) A sale, mortgage or lease made, as required by law, in accordance with an order or decree of a court under this section is effective against the state as representative of the beneficiaries of such trust and persons who might benefit from the purposes for which such real property is held, and against persons with a vested or contingent future interest in such property and minors, incompetents, conservatees,

absentees and persons not in being who have an interest in such property, as well as all other persons who, having been made parties to such proceeding, consent to such order or decree. The purchaser, mortgagee or lessee, or any person claiming under them, shall not be responsible for the disposition of the proceeds of any such sale, mortgage or lease.

(j) Whenever a voluntary association or committee has received, by public subscription, a fund for a charitable or benevolent purpose from more than one thousand contributors, a portion of which remains unexpended after the expiration of five years from the time of its receipt, and it appears that a literal compliance with the terms of the subscription is impracticable, the supreme court may make an order directing that such unexpended balance be transferred for administration and application to such domestic corporation as in the judgment of the court will most effectively accomplish the general purpose for which such fund was collected, free from any restriction, limitation or direction upon which the subscription was made; and on the transfer of such fund to the corporation designated in the order, such voluntary association, its officers and trustees, or such committee and its officers shall be fully exonerated and discharged from all liability to account for such fund. This paragraph shall not restrict in any manner the ability to release or modify restrictions relating to institutional funds under section 555 of the not-for-profit corporation law.

(k) An order shall be made under paragraph (j) on the application of the association or the treasurer of the committee, having custody of the unexpended balance, on twenty days personal notice to the attorney general and notice by publication once a week for four consecutive weeks in a newspaper of general circulation published in the county in which the treasurer of such association or committee resides. If such treasurer resides outside of the state, such notice shall be published in the county in which at least ten per cent of the contributors of such fund resided at the time of its receipt or in such other manner as the court may direct to the contributors as a class, to ten specified members of such class and to the trustees of such association or the surviving members of such committee.

(l) Where public subscriptions for charitable or benevolent purposes were made or begun prior to the year nineteen hundred twenty and the

total number of subscribers exceeded five hundred but were less than one thousand, any unexpended balance of a fund obtained for such purpose which, at the time this section takes effect, is in the custody of a surviving member of a committee may be transferred for administration, on the application of such surviving member, in accordance with the procedure and with the effect set forth in paragraphs (j) and (k).

### **§ 8-1.2 Certain charitable trusts authorized**

(a) Property may be disposed of to any incorporated educational or literary institution in this state, to be held in trust for any one or more of the following purposes:

(1) To establish and maintain an observatory;

(2) To found and maintain professorships and scholarships;

(3) To provide and keep in repair a place for the burial of the dead.

(4) For any other specific purpose comprehended in the general objects authorized by its charter.

(b) The trust may be made subject to such conditions as may be prescribed by the creator and agreed to by the trustee, and all property which is hereafter disposed of to any incorporated educational or literary institution in trust for any of the foregoing purposes, may be held by such institution under such trust, subject to such conditions as may be prescribed.

(c) Property may be disposed of to any incorporated city or village of this state to be held in trust for any educational purpose, the diffusion of knowledge, or for the relief of distress, or for parks, gardens, other ornamental grounds or grounds for military parades, exercise, health and recreation, within or near such incorporated city or village, upon such conditions as may be prescribed by the creator and agreed to by such corporation; and all property so transferred to such corporation may be held by it, under such trust, subject to such conditions as may be prescribed.

(d) Property may be disposed of to commissioners of common schools of any town and to trustees of any school district, in trust for the benefit of such common schools or the schools of such district.

(e) The trusts authorized by this section may continue for such time as may be necessary to accomplish the purposes for which they are

created.

### **§ 8-1.3 Certain charitable trusts regulated**

(a) Any person desiring in his lifetime to promote the public welfare by founding, endowing and maintaining, within this state, a public library, museum or other educational institution, a chapel, crematory or a board of trade or chamber of commerce may, by a disposition for such purpose, transfer property to a trustee named in such disposition or to his successor.

(b) The creator of such disposition may describe:

(1) The nature, object and purpose of the institution to be founded, endowed and maintained or of the corporation to be benefited thereby.

(2) In case of the founding of an institution, the name by which it shall be known.

(3) The powers and duties of the trustee and, if accounting is required, the manner in which and to whom he shall account; but the powers conferred shall not be exclusive of other powers which may be necessary to enable such trustee to execute fully the object of such disposition.

(4) Such rules for the management of the property as the creator may prescribe; but, unless otherwise provided, such rules shall be advisory only and shall not preclude the trustee from making such changes as new circumstances may from time to time require.

(5) The manner and by whom the successor to the trustee named in the disposition is to be appointed.

(6) The place where, and the time when, the buildings necessary and proper for the institution shall be erected, and the character and extent of such buildings. The creator may provide for all matters necessary and proper to carry out the purposes of the institution, and may provide for such lectures, exhibitions, instruction or amusement in connection therewith as he may consider desirable.

(c) The trustee named in the disposition or his successor may sue and defend, in the name of an institution established by such disposition, with respect to all matters affecting such institution.

(d) The creator of the disposition may provide for the right, during his lifetime, to personally perform the duties and exercise the powers

which the disposition imposes and confers upon the trustee, and may further provide that his surviving spouse may, during her lifetime, perform such duties and exercise such powers. In all cases in which such duties and powers are performed and exercised by the creator or his spouse, during his or her lifetime, upon his death or the death of his spouse such duties and powers devolve upon and shall be performed and exercised by the trustee or his successor.

(e) The creator may reserve the right to alter, amend or modify his disposition with respect to any of the matters described in subparagraphs (1) to (6). He may also reserve the right, during his lifetime, to exercise complete control over the property subject to his disposition, without obligation to account therefor in any manner whatever, and may further provide that his surviving spouse shall, during her lifetime, have like control over such property, without obligation to account therefor in any manner whatever.

(f) A disposition described in this section may be executed, acknowledged and recorded in the manner provided by the law of this state for the execution, acknowledgment and recording of conveyances of real property.

(g) No action or proceeding shall be maintained by any person to affect, impair, or defeat a disposition described in this section or to affect the title to property subject to such disposition or the right to the possession of such property or the income therefrom, unless such action or proceeding is commenced within two years from the time such disposition is recorded. Nor shall any defense be made to any action or proceeding maintained by a trustee or his successor which involves the legality of such disposition or affects the title to property subject thereto or the right to the possession of such property or the income therefrom, unless such defense is made in an action or proceeding commenced within two years from the time such disposition is recorded.

#### **§ 8-1.4 Supervision of trustees for charitable purposes**

(a) For the purposes of this section, "trustee" means (1) any individual, group of individuals, executor, trustee, corporation or other legal entity holding and administering property for charitable purposes, whether pursuant to any will, trust, other instrument or

agreement, court appointment, or otherwise pursuant to law, over which the attorney general has enforcement or supervisory powers, (2) any non-profit corporation organized under the laws of this state for charitable purposes and (3) any non-profit foreign corporation organized for charitable purposes, doing business or holding property in this state. Neither a foreign corporation nor a trustee acting under the will of, or an agreement executed by, a non-resident of this state shall become subject to the provisions of this section merely by reason of maintaining a bank, custody, investment or similar account in this state.

(b) The registration and reporting provisions of this section do not apply to (1) the United States, any state, territory or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico or to any of their agencies or governmental subdivisions, (2) any trustee which is required by any other provision of law to render a full, complete and itemized annual financial report to the congress of the United States or to the legislature of this state, provided that such report contains the information required of trustees pursuant to this article, (3) corporations organized under the religious corporations law and other religious agencies and organizations, and charities, agencies and organizations operated, supervised or controlled by or in connection with a religious organization, (4) educational institutions incorporated under the education law or by special act, (5) any hospital, (6) fraternal, patriotic, veterans, volunteer firefighters, volunteer ambulance workers, social, student or alumni organizations and historical societies chartered by the New York state board of regents, (7) a trust for which there is a corporate trustee acting as sole trustee or co-trustee under the terms of a will of a decedent who died domiciled in a state other than New York or a trust instrument executed by a non-resident of the state of New York, (8) any trust in which and so long as the charitable interest is deferred or contingent, (9) any person who, in his or her capacity as an officer, director or trustee of any corporation or organization mentioned in this paragraph, holds property for the religious, educational or charitable purposes of such corporation or organization so long as such corporation or organization is registered with the attorney general pursuant to this section, (10) any cemetery corporation subject to the provisions of

article fifteen of the not-for-profit corporation law, (11) the state parent teachers association and any parent teachers association affiliated with an educational institution that is subject to the jurisdiction of the state education department, (12) any corporation organized under article forty-three of the insurance law. The provisions of this subdivision shall apply only to the registration and reporting requirements of this section and shall not limit, impair, change or alter any other provision of this article, the not-for-profit corporation law or any other provision of law.

(c) The attorney general shall establish and maintain a register of all trustees containing such information as the attorney general deems appropriate, and to that end may conduct such investigations as he or she deems necessary and shall obtain from public records, court officers, taxing authorities, trustees and other sources without the payment of any fee or charge, whatever information, copies of instruments, reports and records are needed for the establishment and maintenance of the register.

(d) Every trustee shall file with the attorney general, within six months after any property held by him or her or any income therefrom is required to be applied to charitable purposes, a copy of the instrument providing for his or her title, powers and duties; provided, however, that any trustee currently registered with the department of law pursuant to article 7-A of the executive law shall be deemed to have complied with this paragraph. If any property held by a trustee or any income therefrom is required to be applied to charitable purposes at the time this section becomes effective, the filing shall be made within six months thereafter.

(e) (1) Whenever any trustee or other person, holding property or any income therefrom, which may be required at any time to be devoted to charitable purposes, shall file in any court in this state (A) any petition for instructions relating to the administration or use of such property or income, (B) any petition for the construction of the instrument under which such property or income is held, (C) any petition respecting the disposition or distribution of such property or income or (D) any accounting, due notice of the action or proceeding shall be served by the petitioner upon the attorney general together with a copy of any petition, accounting, will or trust instrument.

(2) Whenever any instrument of a testamentary nature which provides for a disposition for charitable purposes is the subject of (A) an application for denial of probate, (B) objections to probate or (C) an application for approval of a compromise agreement in respect of probate, due notice of the action or proceeding shall be served by the petitioner upon the attorney general together with a copy of the instrument and of any such application, objections or agreement.

(f) (1) Every trustee shall, in addition to filing copies of any instrument required under paragraph (d) of this section, file with the attorney general and all identified current charitable beneficiaries written annual financial reports, under penalties for perjury, on forms prescribed by the attorney general, setting forth information as to the nature of the assets held for charitable purposes and the administration thereof by the trustee, and shall, file with the attorney general and all identified current charitable beneficiaries a notice of the termination of the interest of any party in a trust that would cause all or part of the trust assets to be applied to charitable purposes or to have the income therefrom so applied, in accordance with rules and regulations of the attorney general.

(2) Trustees required to report to the attorney general under article 7-A of the executive law shall comply with this paragraph by filing with the attorney general in addition to any other reports required herein, copies of the financial reports required by section 172-b of the executive law unless such reports have been filed previously.

(g) Unless the filing of reports is suspended as herein provided, the first report of any trustee shall be filed no later than six months after the end of the fiscal year of the trustee during which he or she becomes subject to this section.

(h) The attorney general shall make rules and regulations necessary for the administration of this section, including rules and regulations as to the time for filing reports, the contents thereof, and any manner of executing and filing them, including but not limited to allowing or requiring any submission to the attorney general to be effected by electronic means and electronic signatures. He or she may classify trusts, estates, corporations and other trustees as to purpose, nature of assets, duration, amount of assets, amounts to be devoted to charitable purposes, or otherwise, and may establish different rules for

different classes as to time and nature of the reports required, to the ends that he or she shall receive current financial reports as to all such trusts, estates, corporations or other trustees which will enable him or her to ascertain whether they are being properly administered. The attorney general may suspend the filing of financial reports as to a particular trustee for a reasonable, specifically designated time upon written application of the trustee, signed under penalties for perjury, and filed with the attorney general and after the attorney general has filed in the register of trustees a written statement that the interests of the beneficiaries will not be prejudiced thereby and that periodic reports during the term of such suspension are not required for proper supervision by his or her office. The filing of the financial reports required by this section, or the exemption from such filing or the suspension therefrom, shall not have the effect of absolving trustees from any responsibility for accounting for property or income held by them for charitable purposes. A copy of an account or other financial report filed by a trustee in any court in this state, if the account or other financial report substantially complies with the rules and regulations of the attorney general, may be filed as a financial report under this section.

(i) The attorney general may investigate transactions and relationships of trustees for the purpose of determining whether or not property held for charitable purposes has been and is being properly administered. The attorney general, his or her assistants, deputies or such other officers as may be designated by him or her, are empowered to subpoena any trustee, agent, fiduciary, beneficiary, institution, association or corporation or other witness, examine any such witness under oath and, for this purpose, administer the necessary oaths, and require the production of any books or papers which they deem relevant to the inquiry.

(j) No person shall be excused from attending such inquiry pursuant to the mandate of a subpoena, or from producing a paper or book, or from being examined or required to answer a question on the ground of failure of tender or payment of a witness fee or mileage, unless at the time of such appearance or production, as the case may be, such witness makes a demand for such payment as a condition precedent to the offering of the testimony or production required by the subpoena and such payment is not

thereupon made. The provisions for payment of a witness fee or mileage do not apply to any trustee or other person holding funds for charitable purposes, or to any person in the employ of any such person, whose conduct or practices are being investigated.

(k) If a person subpoenaed to attend such inquiry fails to obey the mandate of a subpoena without reasonable cause, or if a person in attendance upon such inquiry shall without reasonable cause refuse to be sworn or to be examined or to answer a question or to produce a paper or book when ordered so to do by the officer conducting such inquiry, he or she shall be subject to proceedings under subdivision (b) of section 2308 of the civil practice law and rules.

(l) The register, copies of the instruments and the reports filed with the attorney general shall be open to public inspection, subject to reasonable rules and regulations adopted by the attorney general, which may include such limitations as to type of information subject to inspection or purpose of inspection as the attorney general shall deem to be in the public interest. The attorney general shall withhold from public inspection copies of any report filed with any other governmental agency of this state or of the United States and required by law to be kept confidential by such agency, and shall, upon request of the trustee, withhold from public inspection that portion of any instrument filed which does not relate to charitable purposes and which is not otherwise of public record.

(m) The attorney general may institute appropriate proceedings to secure compliance with this section and to secure the proper administration of any trust, corporation or other relationship to which this section applies. The powers and duties of the attorney general provided in this section are in addition to all other powers and duties he or she may have. No court shall modify or terminate the powers and responsibilities of any trust, corporation or other trustee unless the attorney general is a party to the proceeding, but nothing in this section shall otherwise impair or restrict the jurisdiction of any court with respect to the matters covered by it. The failure of any trustee to register or to file reports as required by this section may be ground for judicial removal of any person responsible for such failure.

(n) This section shall apply regardless of any contrary provisions of any instrument and shall be liberally construed so as to effectuate its

general purpose of protecting the public interest in charitable uses, purposes and dispositions.

(o) Every officer, agency, board or commission of this state or political subdivisions of this state or agencies thereof receiving applications for exemption from taxation of any trustee subject to this section shall annually file with the attorney general a list of all applications received during the year and shall notify the attorney general of any suspension or revocation of a tax exempt status previously granted.

(p) The attorney general shall collect from each trustee at the time of filing of the periodic reports required by this section a fee for the filing of such reports as follows:

(1) Twenty-five dollars, if the net worth of the property held by such trustee for charitable purposes is less than fifty thousand dollars,

(2) Fifty dollars if such net worth is fifty thousand dollars or more but less than two hundred and fifty thousand dollars,

(3) One hundred dollars if such net worth is two hundred and fifty thousand dollars or more but less than one million dollars,

(4) Two hundred fifty dollars if such net worth is one million dollars or more but less than ten million dollars,

(5) Seven hundred and fifty dollars if such net worth is ten million dollars or more but less than fifty million dollars, and

(6) One thousand five hundred dollars if such net worth is fifty million dollars or more.

(q) Any trustee shall be exempt from the annual reporting requirements of this section by filing each year with the attorney general a verified statement executed by such trustee attesting that during the annual reporting period (1) the gross receipts received by said trustee during such annual reporting period were less than twenty-five thousand dollars and that (2) the total assets held by such trustee at no time during such annual reporting period exceeded twenty-five thousand dollars. For the purposes of this paragraph, gross receipts mean the total received during the financial reporting period of (A) gifts, grants, and contributions; (B) gross income and revenue from all sources; and (C) gross amounts from sales of assets, other than inventory; and total assets mean the total principal and the accumulated income, if any, held by such trustee for purposes of charitable distribution on any day

during such annual reporting period.

(r) A trustee who fails to comply with paragraph (d), (f) or (g) of this section shall, after notice of said failure served upon him or her by the attorney general by certified mail, return receipt requested, be liable to the state of New York for a fine of ten dollars a day not to exceed one thousand dollars for each failure to comply after the expiration of the thirty day period following the receipt of the notice from the attorney general, except that the time to comply may be extended by the attorney general. Where the attorney general, after such thirty day period has expired, finds that the failure to comply with paragraph (d), (f) or (g) of this section is due to excusable ignorance or inadvertence or other reasonable cause, the attorney general shall waive the fine imposed by this paragraph.

(s) A trustee shall not be qualified to make application for funds or grants or to receive such funds from any department or agency of the state without certifying compliance with paragraphs (d), (f) and (g) of this section and all applicable registration and reporting requirements of article seven-A of the executive law.

### **§ 8-1.5 Trusts for cemetery purposes**

Dispositions of property in trust for the purpose of the perpetual care, maintenance, improvement or embellishment of cemeteries or private burial lots in cemeteries, and the roadways, lawns, hedges, walks, fences, monuments, structures and tombs in such cemeteries or on such private burial lots are permitted and shall be deemed to be for charitable and benevolent purposes. Such dispositions are not invalid by reason of any indefiniteness or uncertainty of the persons designated as beneficiaries, nor shall they be invalid as violating any existing rule against perpetuities. Nothing herein contained shall affect any existing authority of the courts to determine the reasonableness of the amount of such disposition. Any cemetery association may act as trustee of and execute any such trust with respect to lots, roadways, lawns, hedges, walks, fences, monuments, structures and tombs both within its own cemetery limits and outside of any cemetery under its control but within the county where such cemetery is located, whether or not such power is

included among its corporate powers.

**§ 8-1.6 Deposit of money in trust by owner of lots in private  
unincorporated cemetery**

The owner of lots in any private unincorporated cemetery may deposit in trust for the care of such lots a sum not exceeding four hundred dollars for each lot so owned with any bank or banking institution located in a city, town or village conveniently near such private unincorporated cemetery, provided such bank or banking institution is willing to accept such money in trust and agrees to apply the proceeds of the interest thereon to the care and upkeep of such lots. Such banks or banking institutions are hereby authorized to accept such money for the purpose described herein and to apply the proceeds of the interest thereon to the care and upkeep of any such lots. The provisions of this section do not apply to savings banks.

**§ 8-1.7 Authority of trustee to accumulate income**

(a) Where property has been transferred in trust for any religious, charitable, educational or benevolent purpose, or acquired by the trustee of a trust for such purpose, the trustee is authorized in his discretion, notwithstanding the absence of any direction therefor in the disposition creating the trust, to accumulate the income therefrom to the extent necessary to carry out the purposes of the trust. The authority herein granted is subject:

(1) To any express or implied prohibition by the terms of the disposition creating the trust, by any statute in force at the time of the accumulation or by the charter of a corporate trustee or other document or regulation controlling the trustee in the administration of the trust.

(2) To the supervision of the supreme court or the surrogate's court, as provided in 8-1.1, and to any contrary direction by order of the court in an action or proceeding thereunder.

(b) This section shall not restrict in any manner the appropriation for expenditure or accumulation of endowment funds as set forth in

section 553 of the not-for-profit corporation law.

**§ 8-1.8 Private foundations: administration of certain trusts as defined**  
in the United States internal revenue code of 1954

(a) For purposes of this section, a "trust" means a private foundation as defined in section 509 of the United States Internal Revenue Code of 1986 ("code") including a private foundation charitable trust as defined in section 4947(a)(1) of the code, or a split-interest trust as defined in section 4947(a)(2) of the code, whether heretofore or hereafter created which is administered by a trustee described in subparagraph (a)(1) of section 8-1.4. The administration of a trust, as herein defined, is subject to the following provisions:

(1) The trust shall distribute for each taxable year such amounts at such time and in such manner as sufficient for such trust to avoid liability for any tax imposed on undistributed income under section 4942 of the code.

(2) The trust shall not engage in any act of self-dealing which would result in the taxation of any amount involved with respect to any such act of self-dealing under section 4941 of the code.

(3) The trust shall not retain any excess business holdings which would result in the taxation of any such excess business holdings under section 4943 of the code unless the trust is exempt from section 4943 of the code pursuant to section 4947(b)(3)(A) or (B) of the code.

(4) The trust shall not make any investments in such a manner as to jeopardize the carrying out of any such trust's exempt purposes which would result in the taxation of any such investments under section 4944 of the code unless the trust is exempt from section 4944 of the code pursuant to section 4947(b)(3)(A) or (B) of the code.

(5) The trust shall not make any taxable expenditures which would result in the liability of the trust for any tax imposed on any such taxable expenditures under section 4945 of the code.

Except as provided in paragraph (b), this paragraph applies notwithstanding any provision of the governing instrument of a trust.

(b) Paragraph (a) shall not apply with respect to assets transferred in trust prior to the effective date of this section to the extent that

it conflicts with any mandatory direction in the governing instrument of the trust unless such conflicting direction is removed as impracticable under this article or in any other manner provided by law. The absence of a specific provision in the governing instrument of the trust for the current use of the principal of the fund, or the presence in such an instrument of a provision, as to the principal of a fund, limited to the principal's being held, invested and reinvested, is not such a conflicting mandatory direction.

(b-1) A trust, as defined in paragraph (a) of this section, required by section 6104(d) of the code to make available for public inspection its annual return shall publish notice of the availability of such return for inspection. Such notice shall be published, not later than the day prescribed for filing such annual return (determined with regard to any extension of time for filing), in a newspaper designated by the clerk of the county in which the principal office of the trust is located, having general circulation in that county. When such county is located within a city with a population of one million or more, such designation shall be as though the notice were a notice or advertisement of judicial proceedings. The notice shall state that the annual return of the trust is available at its principal office for inspection during regular business hours by any citizen who requests it within one hundred eighty days after the date of such publication, and shall state the address and the telephone number of the trust's principal office and the name of its principal manager. A copy or notice published in a newspaper other than the newspaper or newspapers designated by the county clerk shall not be deemed to be one of the publications required by this paragraph.

(c) All references in this section to sections of the code shall be to such sections as amended from time to time, or to corresponding provisions of subsequent internal revenue laws.

(d) Nothing in this act shall impair the rights and powers of the courts or the attorney-general of this state.

### **§ 8-1.9 Trust governance**

(a) For purposes of this section:

(1) A "trust" means a trust created solely for charitable purposes, or

a trust that continues solely for such purposes after all non-charitable interests have terminated.

(2) "Charitable purpose" means any religious, charitable, educational or benevolent purpose.

(3) "Key person" means any person other than a trustee, whether or not an employee, who (i) has responsibilities, or exercises powers of influence over the trust as a whole similar to the responsibilities, powers, or influence of trustees and officers; (ii) manages the trust, or a segment of the trust that represents a substantial portion of the activities, assets, income or expenses of the trust; or (iii) alone or with others controls or determines a substantial portion of the trust's capital expenditures or operating budget.

(4) An "affiliate" of a trust means any entity controlled by, or in control of, such trust.

(5) "Relative" of an individual means (i) his or her spouse or domestic partner as defined in section twenty-nine hundred ninety-four-a of the public health law; (ii) his or her ancestors, brothers and sisters (whether whole or half blood), children (whether natural or adopted), grandchildren, great-grandchildren; or (iii) the spouse or domestic partner of his or her brothers, sisters, children, grandchildren, and great-grandchildren.

(6) "Related party" means (i) any trustee or key person of the trust or any affiliate of the trust; (ii) any relative of any individual described in clause (i) of this subparagraph; or (iii) an entity in which any individual described in clauses (i) and (ii) of this subparagraph has a thirty-five percent or greater ownership or beneficial interest or, in the case of a partnership or professional corporation, a direct ownership interest in excess of five percent.

(7) "Independent trustee" means a trustee who: (i) is not, and has not been within the last three years, an employee of the trust or an affiliate of the trust, and does not have a relative who is, or has been within the last three years, a key person of the trust or an affiliate of the trust; (ii) has not received, and does not have a relative who has received, in any of the last three fiscal years, more than ten thousand dollars in direct compensation from the trust or an affiliate of the trust; (iii) is not a current employee of or does not have a substantial financial interest in, and does not have a relative who is a

current officer of or have a substantial financial interest in, any entity that has provided payments, property or services to, or received payments, property or services from, the trust or an affiliate of the trust if the amount paid by the trust to the entity or received by the trust from the entity for such property or services, in any of the last three fiscal years, exceeded the lesser of ten thousand dollars or two percent of such entity's consolidated gross revenue if the entity's consolidated gross revenue was less than five hundred thousand dollars; twenty-five thousand dollars if the entity's consolidated gross revenue was five hundred thousand dollars or more but less than ten million dollars; one hundred thousand dollars if the entity's consolidated gross revenue was ten million dollars or more; or (iv) is not and does not have a relative who is a current owner, whether wholly or partially, director, officer or employee of the trust's outside auditor or who has worked on the trust's audit at any time during the past three years. For purposes of this subparagraph, the terms: "compensation" does not include reimbursement for expenses or the payment of trustee commissions or reasonable compensation as permitted by law and the governing instrument; and "payment" does not include charitable contributions, dues or fees paid to the trust for services which the trust performs as part of its nonprofit purposes, or payments made by the trust at fixed or non-negotiable rates or amounts for services received, provided that such services by and to the trust are available to individual members of the public on the same terms, and such services provided to the trust are not available from another source.

(8) "Related party transaction" means any transaction, agreement or any other arrangement in which a related party has a financial interest and in which the trust or any affiliate of the trust is a participant, except that a transaction shall not be a related party transaction if: (i) the transaction or the related party's financial interest in the transaction is de minimis, (ii) the transaction would not customarily be reviewed by the board, or boards of similar organizations, in the ordinary course of business and is available to others on the same or similar terms, or (iii) the transaction constitutes a benefit provided to a related party solely as a member of a class of the beneficiaries that the trust intends to benefit as part of the accomplishment of its mission which benefit is available to all similarly situated members of

the same class on the same terms.

(9) "Independent auditor" means any certified public accountant performing the audit of the financial statements of a trust required by subdivision one of section one hundred seventy-two-b of the executive law.

(b)(1) The trustees or a designated audit committee consisting of one or more independent trustees of any trust required to file an independent certified public accountant's audit report with the attorney general pursuant to subdivision one of section one hundred seventy-two-b of the executive law shall oversee the accounting and financial reporting processes of the trust and the audit of the trust's financial statements. The trustees or designated audit committee shall annually retain or renew the retention of an independent auditor to conduct the audit and, upon completion thereof, review the results of the audit and any related management letter with the independent auditor.

(2) The trustees or a designated audit committee consisting of one or more independent trustees of any trust required to file an independent certified public accountant's audit report with the attorney general pursuant to subdivision one of section one hundred seventy-two-b of the executive law and that in the prior fiscal year had or in the current fiscal year reasonably expects to have annual revenue in excess of one million dollars shall, in addition to those duties set forth in subparagraph one of this paragraph:

(A) review with the independent auditor the scope and planning of the audit prior to the audit's commencement;

(B) upon completion of the audit, review and discuss with the independent auditor: (i) any material risks and weaknesses in internal controls identified by the auditor; (ii) any restrictions on the scope of the auditor's activities or access to requested information; (iii) any significant disagreements between the auditor and management; and (iv) the adequacy of the trust's accounting and financial reporting processes;

(C) annually consider the performance and independence of the independent auditor; and

(D) if the duties required by this section are performed by an audit committee, report on the committee's activities to the trustees.

(4) If a trust is under the control of another trust or a corporation,

the trustees or designated audit committee of the controlling trust, or the board or designated audit committee of the board of the controlling corporation, may perform the duties required by this paragraph.

(5) Only independent trustees may participate in deliberations or voting relating to matters set forth in this section, provided that nothing in this paragraph shall prohibit the board or designated audit committee from requesting that a person with an interest in the matter present information as background or answer questions at a committee or board meeting prior to the commencement of deliberations or voting relating thereto.

(c) (1) Notwithstanding any provision of the trust instrument to the contrary, no trust shall enter into any related party transaction unless the transaction is determined by the trustees, or an authorized committee thereof, to be fair, reasonable and in the trust's best interest at the time of such determination. Any trustee, officer or key employee who has an interest in a related party transaction shall disclose in good faith to the trustees, or an authorized committee thereof, the material facts concerning such interest.

(2) With respect to any related party transaction in which a related party has a substantial financial interest, the trustees, or an authorized committee thereof, shall:

(A) Prior to entering into the transaction, consider alternative transactions to the extent available;

(B) Approve the transaction by not less than a majority vote of the trustees or committee members present at the meeting; and

(C) Contemporaneously document in writing the basis for the trustees' or authorized committee's approval, including consideration of any alternative transactions.

(3) The trust instrument, by-laws or any policy adopted by the trustees may contain additional restrictions on related party transactions and additional procedures necessary for the review and approval of such transactions, or provide that any transaction in violation of such restrictions shall be void or voidable.

(4) The attorney general may bring an action to enjoin, void or rescind any related party transaction or proposed related party transaction that violates any provision of this article or was otherwise not reasonable or in the best interests of the trust at the time the

transaction was approved, or to seek restitution, and the removal of trustees or officers, or seek to require any person or entity to:

(A) Account for any profits made from such transaction, and pay them to the trust;

(B) Pay the trust the value of the use of any of its property or other assets used in such transaction;

(C) Return or replace any property or other assets lost to the trust as a result of such transaction, together with any income or appreciation lost to the trust by reason of such transaction, or account for any proceeds of sale of such property, and pay the proceeds to the trust together with interest at the legal rate; and

(D) Pay, in the case of willful and intentional conduct, an amount up to double the amount of any benefit improperly obtained.

(5) The powers of the attorney general provided in this section are in addition to all other powers the attorney general may have under this chapter or any other law.

(6) No related party may participate in deliberations or voting relating to a related party transaction in which he or she has an interest; provided that nothing in this section shall prohibit the trustees or designated audit committee from requesting that a related party present information or answer questions concerning a related party transaction at a trustees or committee meeting prior to the commencement of deliberations or voting relating to the related party transaction.

(7) In an action by any person or entity other than the attorney general, it shall be a defense to a claim of violation of any provisions of this paragraph that a transaction was fair, reasonable and in the trust's best interest at the time the trust approved the transaction.

(8) In an action by the attorney general with respect to a related party transaction not approved in accordance with subparagraph one or two of this paragraph at the time it was entered into, whichever is applicable, it shall be a defense to a claim of violation of any provisions of this paragraph that (i) the transaction was fair, reasonable and in the trust's best interest at the time the trust approved the transaction and (ii) prior to receipt of any request for information by the attorney general regarding the transaction, the trustees have: (A) ratified the transaction by finding in good faith that it was fair, reasonable and in the trust's best interest at the

time the trustee approved the transaction; and, with respect to any related party transaction involving a charitable corporation and in which a related party has a substantial financial interest, considered alternative transactions to the extent available, approving the transaction by not less than a majority vote of the trustees or committee members present at the meeting; (B) documented in writing the nature of the violation and the basis for the trustees' or committee's ratification of the transaction; and (C) put into place procedures to ensure that the trustee complies with subparagraphs one and two of this paragraph as to related party transactions in the future.

(d) (1) Except as provided in subparagraph four of this paragraph, every trust shall adopt, and oversee the implementation of, and compliance with, a conflict of interest policy to ensure that its trustees, officers and key persons act in the best interest of the trust and its beneficiaries and comply with applicable legal requirements, including but not limited to the requirements set forth in this paragraph.

(2) The conflict of interest policy shall include, at a minimum, the following provisions:

(A) a definition of the circumstances that constitute a conflict of interest;

(B) procedures for disclosing a conflict of interest or possible conflict of interest to the trustees or to a committee of the trustees, and procedures for the trustees or committee to determine whether a conflict exists;

(C) a requirement that the person with the conflict of interest not be present at or participate in any deliberation or vote on the matter giving rise to such conflict, provided that nothing in this section shall prohibit the trustees or a committee from requesting that the person with the conflict of interest present information as background or answer questions at a trustees or committee meeting prior to the commencement of deliberations or voting relating thereto;

(D) a prohibition against any attempt by the person with the conflict to influence the deliberation or voting on the matter giving rise to such conflict;

(E) a requirement that the existence and resolution of the conflict be documented in the trust's records, including in the minutes of any

meeting at which the conflict was discussed or voted upon; and

(F) procedures for disclosing, addressing, and documenting related party transactions in accordance with this paragraph.

(3) The conflict of interest policy shall require that prior to a trustee's initial appointment, and annually thereafter, such trustee shall complete, sign and file with the records of the trust a written statement identifying any entity of which he or she is an officer, director, trustee, member, owner (either as a sole proprietor or a partner), or employee and with which the trust has a relationship, and any transaction in which the trust is a participant and in which the trustee might have a conflicting interest. The policy shall require that each trustee annually resubmit such written statement. The trustees shall provide a copy of all completed statements to the chair of the audit committee, if there is an audit committee.

(4) A trust that has adopted and possesses a conflict of interest policy pursuant to federal, state or local laws that is substantially consistent with the provisions of subparagraph two of this paragraph shall be deemed in compliance with provisions of this paragraph.

(5) Nothing in this paragraph shall be interpreted to require a trust to adopt any specific conflict of interest policy not otherwise required by this paragraph or any other law or rule, or to supersede or limit any requirement or duty governing conflicts of interest required by any other law or rule.

(e) (1) Except as provided in subparagraph three of this paragraph, the trustees of every trust that has twenty or more employees and in the prior fiscal year had annual revenue in excess of one million dollars shall adopt, and oversee the implementation of, and compliance with, a whistleblower policy to protect from retaliation persons who report suspected improper conduct. Such policy shall provide that no officer, trustee, employee or volunteer of a trust who in good faith reports any action or suspected action taken by or within the trust that is illegal, fraudulent or in violation of any adopted policy of the trust shall suffer intimidation, harassment, discrimination or other retaliation or, in the case of employees, adverse employment consequence.

(2) The whistleblower policy shall include the following provisions:

(A) Procedures for the reporting of violations or suspected violations of laws or trust policies, including procedures for preserving the

confidentiality of reported information;

(B) A requirement that a trustee, officer or employee of the trust be designated to administer, the whistleblower policy and to report to the trustees or an authorized committee thereof, except that trustees who are employees may not participate in any board or committee deliberations or voting relating to administration of the whistleblower policy;

(C) A requirement that the person who is the subject of a whistleblower complaint not be present at or participate in board or committee deliberation or vote on the matter relating to such complaint, provided that nothing in this subparagraph shall prohibit the board or committee from requesting that the person who is subject to the complaint present information as background or answer questions at a committee or board meeting prior to the commencement of deliberations or voting relating thereto; and

(D) A requirement that a copy of the policy be distributed to all trustees, officers, employees and volunteers, with instructions on how to comply with the procedures set forth in the policy. For purposes of this subdivision, posting the policy on the corporation's website or at the corporation's offices in a conspicuous location accessible to employees and volunteers are among the methods a corporation may use to satisfy the distribution requirement.

(3) A trust that has adopted and possesses a whistleblower policy pursuant to federal, state or local laws that is substantially consistent with the provisions of subparagraph two of this paragraph shall be deemed in compliance with the provisions of this paragraph.

(4) Nothing in this paragraph shall be interpreted to relieve any trust from any additional requirements in relation to internal compliance, retaliation, or document retention required by any other law or rule.

## ARTICLE 9

### **PERPETUITIES AND ACCUMULATIONS**

#### PART 1. PERPETUITIES

Section 9-1.1 Rule against perpetuities.

9-1.2 Reduction of age contingency.

9-1.3 Rules of construction.

9-1.4 Acquisition of real property by foreign trust.

9-1.5 Trust with transferable certificates.

9-1.6 Trust for employees.

9-1.7 Trust for self-employed individuals and others.

9-1.8 Trust created by national securities exchange to assist customers of members, member firms or member corporations.

## PART 2. ACCUMULATIONS

Section 9-2.1 Rules governing accumulations.

9-2.2 Anticipation of directed accumulation.

9-2.3 Undistributed income.

## PART 1. PERPETUITIES

### **§ 9-1.1 Rule against perpetuities**

(a) (1) The absolute power of alienation is suspended when there are no persons in being by whom an absolute fee or estate in possession can be conveyed or transferred.

(2) Every present or future estate shall be void in its creation which shall suspend the absolute power of alienation by any limitation or condition for a longer period than lives in being at the creation of the estate and a term of not more than twenty-one years. Lives in being shall include a child conceived before the creation of the estate but born thereafter. In no case shall the lives measuring the permissible period be so designated or so numerous as to make proof of their end unreasonably difficult.

(b) No estate in property shall be valid unless it must vest, if at all, not later than twenty-one years after one or more lives in being at the creation of the estate and any period of gestation involved. In no case shall lives measuring the permissible period of vesting be so designated or so numerous as to make proof of their end unreasonably difficult.

## **§ 9-1.2 Reduction of age contingency**

Where an estate would, except for this section, be invalid because made to depend, for its vesting or its duration, upon any person attaining or failing to attain an age in excess of twenty-one years, the age contingency shall be reduced to twenty-one years as to any or all persons subject to such contingency.

## **§ 9-1.3 Rules of construction**

(a) Unless a contrary intention appears, the rules of construction provided in this section govern with respect to any matter affecting the rule against perpetuities.

(b) It shall be presumed that the creator intended the estate to be valid.

(c) Where an estate would, except for this paragraph, be invalid because of the possibility that the person to whom it is given or limited may be a person not in being at the time of the creation of the estate, and such person is referred to in the instrument creating such estate as the spouse of another without other identification, it shall be presumed that such reference is to a person in being on the effective date of the instrument.

(d) Where the duration or vesting of an estate is contingent upon the probate of a will, the appointment of a fiduciary, the location of a distributee, the payment of debts, the sale of assets, the settlement of an estate, the determination of questions relating to an estate or transfer tax or the occurrence of any specified contingency, it shall be presumed that the creator of such estate intended such contingency to occur, if at all, within twenty-one years from the effective date of the instrument creating such estate.

(e) (1) Where the validity of a disposition depends upon the ability of a person to have a child at some future time, it shall be presumed, subject to subparagraph (2), that a male can have a child at fourteen years of age or over, but not under that age, and that a female can have a child at twelve years of age or over, but not under that age or over the age of fifty-five years.

(2) In the case of a living person, evidence may be given to establish

whether he or she is able to have a child at the time in question.

(3) Where the validity of a disposition depends upon the ability of a person to have a child at some future time, the possibility that such person may have a child by adoption shall be disregarded.

(4) The provisions of subparagraphs (1), (2) and (3) shall not apply for any purpose other than that of determining the validity of a disposition under the rule against perpetuities where such validity depends on the ability of a person to have a child at some future time. A determination of validity or invalidity of a disposition under the rule against perpetuities by the application of subparagraph (1) or (2) or (3) shall not be affected by the later occurrence of facts in contradiction to the facts presumed or determined or the possibility of adoption disregarded under subparagraphs (1) or (2) or (3).

#### **§ 9-1.4 Acquisition of real property by foreign trust**

Where real property situated in this state is acquired by a trust validly created under the law of another jurisdiction, whether there is a violation of the rule against perpetuities and whether a direction for the accumulation of rents and profits is valid are determined by the law of this state in effect at the time of the acquisition of such property.

#### **§ 9-1.5 Trust with transferable certificates**

A trust with transferable certificates, heretofore or hereafter created, is not invalid as violating the rule against perpetuities; but such trust may continue for such time as may be necessary to accomplish the purposes for which it is created if the instrument creating such trust provides that it may be terminated at any time by action of the trustees or by affirmative vote of the beneficiaries having a specified percentage of interest therein. This section applies to an investment trust, which is an unincorporated trust or association managed by trustees not holding any property for sale to customers in the ordinary course of its trade or business, the beneficial ownership of which is evidenced by transferable shares or by transferable certificates of

beneficial interest offered for sale to the public.

#### **§ 9-1.6 Trust for employees**

A trust created by an employer, as part of a stock bonus, pension, disability or death benefit or profit-sharing plan, for the exclusive benefit of some or all of his employees, to which contributions are made by such employer or employees, or both, for the purpose of distributing to such employees the income or principal, or both, of the fund so held in trust, is not invalid as violating the rule against perpetuities; but such trust may continue for such time as may be necessary to accomplish the purposes for which it is created.

#### **§ 9-1.7 Trust for self-employed individuals and others**

No trust created under a retirement plan, which is exempt from federal income taxation under the laws of the United States, is invalid as violating the rule against perpetuities or the rules governing the accumulation of income. Such a trust may continue for such time as may be necessary to accomplish the purposes for which it is created; may permit the accumulation of income until such time as the income is distributed to the beneficiaries under the terms of the trust; and may, according to its terms, be made irrevocable and the interest of its beneficiaries nontransferable by assignment or otherwise. A trust so made irrevocable is not subject to revocation upon the written consent of its beneficiaries as provided in 7-1.9.

#### **§ 9-1.8 Trust created by national securities exchange to assist**

customers of members, member firms or member corporations

(a) A trust created by a national securities exchange for the purpose of enabling the trustees, in their discretion, to provide direct or indirect assistance to customers of a member, member firm or member corporation of such exchange, threatened with loss of their money or securities because such member, member firm or member corporation, in

the opinion of the trustees, is insolvent or may be unable without assistance to meet its obligations to such customers, is not invalid as violating the rule against perpetuities or the rules governing the accumulation of income. Such a trust may continue and may accumulate the income from the property held therein for such time as may be necessary to accomplish the purposes for which it is created.

(b) As used in this section, the term "national securities exchange" means any exchange registered as a national securities exchange under the federal securities exchange act of nineteen hundred thirty-four, as the same may be amended from time to time.

## **PART 2. ACCUMULATIONS**

### **§ 9-2.1 Rules governing accumulations**

(a) All directions for the accumulation of income are void unless authorized by statute.

(b) A direction for the accumulation of income is valid if such accumulation is to begin and terminate within the time allowed by the rule against perpetuities. An accumulation directed to continue for a period extending beyond the expiration of such time terminates upon such expiration.

(c) Where property is disposed of in trust for any religious, charitable, educational or benevolent purpose and no valid future estate, except for a similar purpose, is created by such disposition, a direction for the accumulation by the trustee of income received for such purpose is valid without regard to the time at which the accumulation is to begin or to terminate, but the accumulation is subject to the supervision and control of the supreme court or the surrogate's court as provided in 8-1.1.

(d) The income from a trust created by an employer, as part of a stock bonus, a pension, disability or death benefit or profit-sharing plan, for the exclusive benefit of some or all of his employees, to which contributions are made by such employer or employees or both, for the purpose of distributing to such employees the income or principal, or both, of the trust, may be accumulated until the funds are sufficient,

in the opinion of the employer, to accomplish the purposes of such plan.

### **§ 9-2.2 Anticipation of directed accumulation**

(a) When a valid accumulation is directed for the benefit of a person without other sufficient means to support or educate himself, the supreme court or, if such accumulation was directed by will, the surrogate's court of the county in which such will is admitted to probate, on the application of such person, his guardian, committee, or conservator may direct that a suitable sum from the income accumulated or to be accumulated be applied for the support or education of such person.

(b) When the proceeds of a life insurance policy issued or delivered in this state are being retained under an agreement by the insurer to credit interest thereon for the benefit of a person without other sufficient means to support or educate himself, the supreme court, on the application of such person, his guardian, committee, or conservator may direct that a suitable sum from the interest credited or agreed to be credited be applied for the support or education of such person.

### **§ 9-2.3 Undistributed income**

When income is not disposed of and no valid direction is given for its accumulation it passes to the persons presumptively entitled to the next eventual estate.

## **ARTICLE 10**

### **POWERS**

#### **PART 1. COMMON LAW OF POWERS ESTABLISHED WITH EXCEPTIONS**

Section 10-1.1 Common law of powers retained, except as modified by this article.

#### **PART 2. DEFINITIONS**

Section 10-2.1 Power.

10-2.2 Other words defined.

#### **PART 3. VARIETIES OF POWERS**

Section 10-3.1 Powers of appointment and other powers.

10-3.2 Classification of powers of appointment as to kind; general and special; exclusive and non-exclusive.

10-3.3 Classification of powers of appointment as to time of exercise; presently exercisable, testamentary and postponed.

10-3.4 Classification of powers of appointment as to duty to exercise; imperative and discretionary.

#### PART 4. CREATION OF A POWER OF APPOINTMENT

Section 10-4.1 Rules for creation of a power of appointment.

#### PART 5. EXTENT OF DONEE'S AUTHORITY TO APPOINT OR CONTRACT TO APPOINT AN ESTATE IN APPOINTIVE PROPERTY

Section 10-5.1 Scope of the authority of the donee.

10-5.2 Contract to appoint; power presently exercisable.

10-5.3 Contract to appoint; power not presently exercisable.

10-5.4 Priority.

#### PART 6. RULES GOVERNING EXERCISE OF A POWER OF APPOINTMENT

Section 10-6.1 Exercise of a power of appointment; manifestation of intention of donee.

10-6.2 Exercise of a power of appointment; conformity to directions of donor.

10-6.3 Exercise of a power of appointment; type of instrument.

10-6.4 Exercise of a power of appointment; required consents.

10-6.5 Exercise of exclusive and non-exclusive power of appointment.

10-6.6 Exercise of a power of appointment; effect when more extensive or less extensive than authorized; trustee's authority to invade principal in trust.

10-6.7 Exercise by all donees; exceptions.

10-6.8 Imperative power of appointment; effectuation.

10-6.9 Exercise of a power of appointment in further trust.

#### PART 7. RIGHTS OF CREDITORS IN APPOINTIVE PROPERTY

Section 10-7.1 Creditors of the donee; special power.

10-7.2 Creditors of the donee; general power presently exercisable.

10-7.3 Creditors of the donee; power subject to a condition.

10-7.4 Creditors of the donee; general power not presently exercisable.

**PART 8. RULE AGAINST PERPETUITIES AND ACCUMULATIONS AS  
AFFECTED BY POWERS OF APPOINTMENT**

Section 10-8.1 Rule against perpetuities; time at which permissible period begins.

10-8.2 Rule against perpetuities; law which determines permissible period.

10-8.3 Rule against perpetuities; facts to be considered.

10-8.4 Rule against accumulations; law determining validity in exercise of a power of appointment.

**PART 9. REVOCATION AND RELEASE OF A POWER OF APPOINTMENT**

Section 10-9.1 Revocability of a power of appointment.

10-9.2 Release of a power of appointment.

**PART 10. PROVISIONS AFFECTING POWERS OTHER THAN  
POWERS OF APPOINTMENT**

Section 10-10.1 Power to distribute principal or allocate income; restriction on exercise.

10-10.2 Power to lease in tenant for life; scope.

10-10.3 Power to lease in tenant for life; transfer and extinguishment.

10-10.4 Power to lease in tenant for life; effect of mortgage.

10-10.5 Power to sell in a mortgage.

10-10.6 Effect of reserved unqualified power to revoke.

10-10.7 Exercise of powers by multiple fiduciaries; joint and several powers.

10-10.8 Irrevocability of powers other than powers of appointment.

**PART 1. COMMON LAW OF POWERS ESTABLISHED WITH EXCEPTIONS**

**§ 10-1.1 Common law of powers retained, except as modified by this  
article**

The common law of powers as embodied in this article and as to matters

not included herein, as heretofore established, is retained as the law of this state except as modified by the provisions of this article.

## **PART 2. DEFINITIONS**

### **§ 10-2.1 Power**

A power is an authority to do any act in relation to property, including the creation or revocation of an estate therein or a charge thereon, which the donor of the power might himself do, except that the term, as used in this article, does not apply to a power of attorney to convey property in the name of the owner, regulated by other statutes.

### **§ 10-2.2 Other words defined**

(a) Donor. A donor is the person who creates or reserves a power.

(b) Donee. A donee is the person to whom a power is given or in whose favor a power is reserved.

(c) Appointee. An appointee is the person in whose favor a power of appointment is exercisable.

(d) Appointive property. Appointive property is property which is the subject of a power of appointment.

## **PART 3. VARIETIES OF POWERS**

### **§ 10-3.1 Powers of appointment and other powers**

(a) This article applies to powers of appointment. A power of appointment, as the term is used in this article, is an authority created or reserved by a person having property subject to his disposition, enabling the donee to designate, within such limits as may be prescribed by the donor, the appointees of the property or the shares or the manner in which such property shall be received.

(b) This article applies, generally, to powers which are not powers of

appointment, such as a power to revoke a disposition previously made, a power during minority to manage property vested in an infant, a power to disburse the principal of a trust, a power to sell in a mortgage and a power in a life tenant to make leases. This enumeration is not exclusive but illustrative.

**§ 10-3.2 Classification of powers of appointment as to kind; general and special; exclusive and non-exclusive**

(a) A power of appointment is:

(1) general or special.

(2) exclusive or non-exclusive.

(b) A power of appointment is general to the extent that it is exercisable wholly in favor of the donee, his estate, his creditors or the creditors of his estate.

(c) All other powers of appointment are special.

(d) A special power of appointment is exclusive if it may be exercised in favor of one or more of the appointees to the exclusion of the others.

(e) A special power of appointment is non-exclusive if it must be exercised in favor of all the appointees.

**§ 10-3.3 Classification of powers of appointment as to time of exercise; presently exercisable, testamentary and postponed**

(a) A power of appointment, as to the time of its exercise, is either presently exercisable, testamentary or postponed.

(b) A power of appointment is presently exercisable if it may be exercised by the donee, during his lifetime or by his written will, at any time after its creation, and does not include a postponed power as described in paragraph (d).

(c) A power of appointment is testamentary if it is exercisable only by a written will of the donee.

(d) A power of appointment is postponed if it is exercisable by the donee only after the expiration of a stated time or after the occurrence or non-occurrence of a specified event.

**§ 10-3.4 Classification of powers of appointment as to duty to exercise;  
imperative and discretionary**

(a) A power of appointment is either imperative or discretionary.

(b) A power of appointment is imperative if the instrument creating it imposes on the donee a duty to exercise it, and it may be imperative even though it is exclusive.

(c) A power of appointment is discretionary if the donee is authorized to exercise or not to exercise it.

**PART 4. CREATION OF A POWER OF APPOINTMENT**

**§ 10-4.1 Rules for creation of a power of appointment.**

(a) The donor of a power of appointment:

(1) Must be a person capable of transferring the appointive property.

(2) Must have created or reserved the power by a written instrument executed by him in the manner required by law.

(3) Must manifest his intention to confer the power on a person capable of holding the appointive property.

(4) Cannot nullify or alter the rights of creditors of the donee, as defined in this article, by any language in the instrument creating or reserving the power purporting to give the interest of such donee a spendthrift character.

**PART 5. EXTENT OF DONEE'S AUTHORITY TO APPOINT OR CONTRACT  
TO APPOINT AN ESTATE IN APPOINTIVE PROPERTY**

**§ 10-5.1 Scope of the authority of the donee**

The scope of the donee's authority as to appointees and as to the time and manner of the appointment is unlimited except as the donor manifests a contrary intention.

### **§ 10-5.2 Contract to appoint; power presently exercisable**

The donee of a power of appointment which is presently exercisable, or of a postponed power which has become exercisable, can contract to make an appointment to the extent that the contract or the promised appointment does not confer a benefit upon a person who is not a permissible appointee under the power.

### **§ 10-5.3 Contract to appoint; power not presently exercisable**

(a) The donee of a power of appointment which is not presently exercisable, or of a postponed power which has not become exercisable, cannot contract to make an appointment; except that this prohibition shall not apply if the donor and donee are the same person. Such a prohibited contract, if made, cannot be the basis of an action for specific performance or damages, but the promisee can obtain restitution of the value given by him for the promise unless the donee has exercised the power pursuant to the contract.

(b) The provisions of this section shall not abridge the ability of the donee of a power of appointment which is not presently exercisable to release his power pursuant to 10-9.2 or to make the power, after release, an imperative power, except that where the donor designated persons or a class to take in default of the donee's exercise of the power, a release with respect to appointive property must serve to benefit all those so designated as provided by the donor.

### **§ 10-5.4 Priority**

The interest of the donee of a power of appointment, and of any appointee thereunder, has priority with respect to real property subject thereto, as against creditors, purchasers or incumbrancers, in good faith and without notice, of or from a person having an estate in such property, only from the time at which the instrument creating the power is duly recorded. As against all other persons, such interest has priority from the time at which the instrument creating the power takes

effect.

## **PART 6. RULES GOVERNING EXERCISE OF A POWER OF APPOINTMENT**

### **§ 10-6.1 Exercise of a power of appointment; manifestation of intention of donee**

(a) Subject to paragraph (b), an effective exercise of a power of appointment does not require an express reference to such power. A power is effectively exercised if the donee manifests his intention to exercise it. Such a manifestation exists when the donee:

(1) Declares in substance that he is exercising all the powers he has;

(2) Sufficiently identifying the appointive property or any part thereof, executes an instrument purporting to dispose of such property or part;

(3) Makes a disposition which, when read with reference to the property he owned and the circumstances existing at the time of its making, manifests his understanding that he was disposing of the appointive property; or

(4) Leaves a will disposing of all of his property or all of his property of the kind covered by the power, unless the intention that the will is not to operate as an execution of the power appears expressly or by necessary implication.

(b) If the donor has expressly directed that no instrument shall be effective to exercise the power unless it contains a specific reference to the power, an instrument not containing such reference does not validly exercise the power.

### **§ 10-6.2 Exercise of a power of appointment; conformity to directions of donor**

(a) Subject to the power of a court of competent jurisdiction to remedy a defective execution of an imperative power of appointment, the directions of the donor as to the manner, time and conditions of the exercise of a power must be observed, except that:

(1) Where the donor has authorized it to be exercised by an instrument legally insufficient to dispose of the appointive property, the manner of exercise is to be determined by the provisions of this article.

(2) Where the donor has directed any formality to be observed in its exercise, in addition to those which would be legally sufficient to dispose of the appointive property, such additional formality is not necessary to a valid exercise of such power.

(3) Where the donor has made the power exercisable only by deed, it is also exercisable by a written will unless exercise by will is expressly excluded.

(4) Where the donor of a general power of appointment has not expressly imposed a requirement of good faith or of reasonableness with respect to the donee's exercise of such power, neither such requirement shall be implied.

### **§ 10-6.3 Exercise of a power of appointment; type of instrument**

A power of appointment can be exercised only by a written instrument which would be sufficient to dispose of the estate intended to be appointed if the donee were the actual owner.

### **§ 10-6.4 Exercise of a power of appointment; required consents**

(a) When the consent of the donor or of a third person to the exercise of a power of appointment is required, such consent shall be expressed in a written instrument, subscribed by the person whose consent is required; and to entitle the instrument of exercise to be recorded, the signatures of the donee and of the person consenting must be acknowledged or proved in the manner required by the laws of this state for the recording of a deed of real property.

(b) Unless the donor expressly provides otherwise:

(1) When the consents of two or more persons are required for the exercise of a power of appointment, all must consent.

(2) If before the exercise of the power:

(A) One or more of such persons die, the consent of the survivor is sufficient.

(B) One or more of such persons become incompetent, the consent of the competent person is sufficient.

#### **§ 10-6.5 Exercise of exclusive and non-exclusive power of appointment**

(a) Unless the donor expressly provides otherwise:

(1) The donee of an exclusive power may appoint all or any part of the appointive property to one or more of the appointees to the exclusion of the others.

(2) The donee of a non-exclusive power must appoint in favor of all of the appointees equally.

#### **§ 10-6.6 Exercise of a power of appointment; effect when more extensive or less extensive than authorized; trustee's authority to invade principal in trust.**

(a) An exercise of a power of appointment is not void because its exercise is:

(1) More extensive than was authorized but is valid to the extent authorized by the instrument creating the power.

(2) Less extensive than authorized by the instrument creating the power, unless the donor has manifested a contrary intention.

(b) An authorized trustee with unlimited discretion to invade trust principal may appoint part or all of such principal to a trustee of an appointed trust for, and only for the benefit of, one, more than one or all of the current beneficiaries of the invaded trust (to the exclusion of any one or more of such current beneficiaries). The successor and remainder beneficiaries of such appointed trust may be one, more than one or all of the successor and remainder beneficiaries of such invaded trust (to the exclusion of any one, more than one or all of such successor and remainder beneficiaries).

(1) An authorized trustee exercising the power under this paragraph may grant a discretionary power of appointment as defined in paragraph (c) of section 10-3.4 of this article (including a presently exercisable power of appointment) in the appointed trust to one or more of the current beneficiaries of the invaded trust, provided that the beneficiary granted a power to appoint could receive the principal

outright under the terms of the invaded trust.

(2) If the authorized trustee grants a power of appointment under subparagraph (1) of this paragraph, except as otherwise provided in subparagraph (3) of this paragraph, the granted power may only exclude as permissible appointees one or more of the beneficiary, the creator, or the creator's spouse, or any of the estates, creditors, or creditors of the estates of the beneficiary, the creator or the creator's spouse.

(3) If the authorized trustee exercises the power under this paragraph, the appointed trust may grant any power of appointment included in the invaded trust provided such power has the same class of permissible appointees as the power of appointment in the invaded trust and is exercisable in the same fashion as the power of appointment in the invaded trust.

(4) If the beneficiary or beneficiaries of the invaded trust are described by a class, the beneficiary or beneficiaries of the appointed trust may include present or future members of such class.

(c) An authorized trustee with the power to invade trust principal but without unlimited discretion may appoint part or all of the principal of the trust to a trustee of an appointed trust, provided that the current beneficiaries of the appointed trust shall be the same as the current beneficiaries of the invaded trust and the successor and remainder beneficiaries of the appointed trust shall be the same as the successor and remainder beneficiaries of the invaded trust.

(1) If the authorized trustee exercises the power under this paragraph, the appointed trust shall include the same language authorizing the trustee to distribute the income or invade the principal of the appointed trust as in the invaded trust.

(2) If the authorized trustee exercises the power under this paragraph to extend the term of the appointed trust beyond the term of the invaded trust, for any period after the invaded trust would have otherwise terminated under the provisions of the invaded trust, the appointed trust, in addition to the language required to be included in the appointed trust pursuant to subparagraph (1) of this paragraph, may also include language providing the trustees with unlimited discretion to invade the principal of the appointed trust during such extended term.

(3) If the beneficiary or beneficiaries of the invaded trust are described by a class, the beneficiary or beneficiaries of the appointed

trust shall include present or future members of such class.

(4) If the authorized trustee exercises the power under this paragraph and if the invaded trust grants a power of appointment to a beneficiary of the trust, the appointed trust shall grant such power of appointment in the appointed trust and the class of permissible appointees shall be the same as in the invaded trust.

(d) An exercise of the power to invade trust principal under paragraphs (b) and (c) of this section shall be considered the exercise of a special power of appointment as defined in section 10-3.2 of this article.

(e) The appointed trust to which an authorized trustee appoints the assets of the invaded trust may have a term that is longer than the term set forth in the invaded trust, including, but not limited to, a term measured by the lifetime of a current beneficiary.

(f) If an authorized trustee has unlimited discretion to invade the principal of a trust and the same trustee or another trustee has the power to invade principal under the trust instrument which power is not subject to unlimited discretion, such authorized trustee having unlimited discretion may exercise the power of appointment under paragraph (b) of this section.

(g) An authorized trustee may exercise the power to appoint in favor of an appointed trust under paragraphs (b) and (c) of this section whether or not there is a current need to invade principal under the terms of the invaded trust.

(h) An authorized trustee exercising the power under this section has a fiduciary duty to exercise the power in the best interests of one or more proper objects of the exercise of the power and as a prudent person would exercise the power under the prevailing circumstances. The authorized trustee may not exercise the power under this section if there is substantial evidence of a contrary intent of the creator and it cannot be established that the creator would be likely to have changed such intention under the circumstances existing at the time of the exercise of the power. The provisions of the invaded trust alone are not to be viewed as substantial evidence of a contrary intent of the creator unless the invaded trust expressly prohibits the exercise of the power in the manner intended by the authorized trustee.

(i) Unless the authorized trustee provides otherwise:

(1) The appointment of all of the assets comprising the principal of the invaded trust to an appointed trust shall include subsequently discovered assets of the invaded trust and undistributed principal of the invaded trust acquired after the appointment to the appointed trust; and

(2) The appointment of part but not all of the assets comprising the principal of the invaded trust to an appointed trust shall not include subsequently discovered assets belonging to the invaded trust and principal paid to or acquired by the invaded trust after the appointment to the appointed trust; such assets shall remain the assets of the invaded trust.

(j) The exercise of the power to appoint to an appointed trust under paragraph (b) or (c) of this section shall be evidenced by an instrument in writing, signed, dated and acknowledged by the authorized trustee. The exercise of the power shall be effective thirty days after the date of service of the instrument as specified in subparagraph (2) of this paragraph, unless the persons entitled to notice consent in writing to a sooner effective date. The exercise of the power is irrevocable on such effective date, either thirty days following service of the notice or the effective date as set forth in the written consent.

(1) An authorized trustee may exercise the power authorized by paragraphs (b) and (c) of this section without the consent of the creator, or of the persons interested in the invaded trust, and without court approval, provided that the authorized trustee may seek court approval for the exercise with notice to all persons interested in the invaded trust.

(2) A copy of the instrument exercising the power and a copy of each of the invaded trust and the appointed trust shall be delivered (A) to the creator, if living, of the invaded trust, (B) to any person having the right, pursuant to the terms of the invaded trust, to remove or replace the authorized trustee exercising the power under paragraph (b) or (c) of this section, and (C) to any persons interested in the invaded trust and the appointed trust (or, in the case of any persons interested in the trust, to any guardian of the property, conservator or personal representative of any such person or the parent or person with whom any such minor person resides), by registered or certified mail, return receipt requested, or by personal delivery or in any other manner

directed by the court having jurisdiction over the invaded trust.

(3) The instrument exercising the power shall state whether the appointment is of all the assets comprising the principal of the invaded trust or a part but not all the assets comprising the principal of the invaded trust and if a part, the approximate percentage of the value of the principal of the invaded trust that is the subject of the appointment.

(4) A person interested in the invaded trust may object to the trustee's exercise of the power under this section by serving a written notice of objection upon the trustee prior to the effective date of the exercise of the power. The failure to object shall not constitute a consent.

(5) The receipt of a copy of the instrument exercising the power shall not affect the right of any person interested in the invaded trust to compel the authorized trustee who exercised the power under paragraph (b) or (c) of this section to account for such exercise and shall not foreclose any such interested person from objecting to an account or compelling a trustee to account. Whether the exercise of a power under paragraph (b) or (c) of this section begins the running of the statute of limitations on an action to compel a trustee to account shall be based on all the facts and circumstances of the situation.

(6) A copy of the instrument exercising the power shall be kept with the records of the invaded trust and, within twenty days of the effective date, the original shall be filed in the court having jurisdiction over the invaded trust. Where a trustee of an inter vivos trust exercises the power and the trust has not been the subject of a proceeding in the surrogate's court, no filing is required. The instrument shall state that in certain circumstances the appointment will begin the running of the statute of limitations that will preclude persons interested in the invaded trust from compelling an accounting by the trustees after the expiration of a given time.

(7) Prior to the effective date as provided herein, a trustee may revoke the exercise of the power to invade to a new trust. Where a trustee has served notice of the exercise of the power pursuant to subparagraph (2) of this paragraph, the trustee shall serve notice of the revocation of the exercise of the power to persons interested in the invaded trust and the appointed trust by registered or certified mail,

return receipt requested, or by personal delivery or in any other manner directed by the court having jurisdiction over the invaded trust. Where the notice of the exercise of the power was filed with the court, the trustee shall file the notice of revocation of the exercise of the power with such court.

(k) This section shall not be construed to abridge the right of any trustee to appoint property in further trust that arises under the terms of the governing instrument of a trust or under any other provision of law or under common law, or as directed by any court having jurisdiction over the trust.

(1) Nothing in this section is intended to create or imply a duty to exercise a power to invade principal, and no inference of impropriety shall be made as a result of an authorized trustee not exercising the power conferred under paragraph (b) or (c) of this section.

(m) A power authorized by paragraph (b) or (c) of this section may be exercised, subject to the provisions of paragraph (h) of this section, unless expressly prohibited by the terms of the governing instrument, but a general prohibition of the amendment or revocation of the invaded trust or a provision that constitutes a spendthrift clause shall not preclude the exercise of a power under paragraph (b) or (c) of this section.

(n) An authorized trustee may not exercise a power authorized by paragraph (b) or (c) of this section to effect any of the following:

(1) To reduce, limit or modify any beneficiary's current right to a mandatory distribution of income or principal, a mandatory annuity or unitrust interest, a right to withdraw a percentage of the value of the trust or a right to withdraw a specified dollar amount, provided that such mandatory right has come into effect with respect to the beneficiary. Notwithstanding the foregoing, but subject to the other limitations in this section, an authorized trustee may exercise a power authorized by paragraph (b) or (c) of this section to appoint to an appointed trust that is a supplemental needs trust that conforms to the provisions of section 7-1.12 of this chapter;

(2) To decrease or indemnify against a trustee's liability or exonerate a trustee from liability for failure to exercise reasonable care, diligence and prudence;

(3) To eliminate a provision granting another person the right to

remove or replace the authorized trustee exercising the power under paragraph (b) or (c) of this section unless a court having jurisdiction over the trust specifies otherwise;

(4) To make a binding and conclusive fixation of the value of any asset for purposes of distribution, allocation or otherwise; or

(5) To jeopardize (A) the deduction or exclusion originally claimed with respect to any contribution to the invaded trust that qualified for the annual exclusion under section 2503(b) of the internal revenue code, the marital deduction under section 2056(a) or 2523(a) of the internal revenue code, or the charitable deduction under section 170(a), 642(c), 2055(a) or 2522(a) of the internal revenue code, (B) the qualification of a transfer as a direct skip under section 2642(c) of the internal revenue code, or (C) any other specific tax benefit for which a contribution originally qualified for income, gift, estate, or generation-skipping transfer tax purposes under the internal revenue code.

(o) An authorized trustee shall consider the tax implications of the exercise of the power under paragraph (b) or (c) of this section.

(p) An authorized trustee may not exercise a power described in paragraph (b) or (c) of this section in violation of the limitations under sections 9-1.1, 10-8.1 and 10-8.2 of this chapter, and any such exercise shall void the entire exercise of such power.

(q)(1) Unless a court otherwise directs, an authorized trustee may not exercise a power authorized by paragraph (b) or (c) of this section to change the provisions regarding the determination of the compensation of any trustee; the commissions or other compensation payable to the trustees of the invaded trust may continue to be paid to the trustees of the appointed trust during the term of the appointed trust and shall be determined in the same manner as in the invaded trust.

(2) No trustee shall receive any paying commission or other compensation for appointing of property from the invaded trust to an appointed trust pursuant to paragraph (b) or (c) of this section.

(r) Unless the invaded trust expressly provides otherwise, this section applies to:

(1) Any trust governed by the laws of this state, including a trust whose governing law has been changed to the laws of this state; and

(2) Any trust that has a trustee who is an individual domiciled in

this state or a trustee which is an entity having an office in this state, provided that a majority of the trustees select this state as the location for the primary administration of the trust by an instrument in writing, signed and acknowledged by a majority of the trustees. The instrument exercising this selection shall be kept with the records of the invaded trust.

(s) For purposes of this section:

(1) The term "appointed trust" means an irrevocable trust which receives principal from an invaded trust under paragraph (b) or (c) of this section including a new trust created by the creator of the invaded trust or by the trustees, in that capacity, of the invaded trust. For purposes of creating the new trust, the requirement of section 7-1.17 of this chapter that the instrument be executed and acknowledged by the person establishing such trust shall be deemed satisfied by the execution and acknowledgment of the trustee of the appointed trust.

(2) The term "authorized trustee" means, as to an invaded trust, any trustee or trustees with authority to pay trust principal to or for one or more current beneficiaries other than (i) the creator, or (ii) a beneficiary to whom income or principal must be paid currently or in the future, or who is or will become eligible to receive a distribution of income or principal in the discretion of the trustee (other than by the exercise of a power of appointment held in a non-fiduciary capacity).

(3) References to sections of the "internal revenue code" refer to the United States internal revenue code of 1986, as amended from time to time, or to corresponding provisions of subsequent internal revenue laws, and also refer to corresponding provisions of state law.

(4) The term "current beneficiary or beneficiaries" means the person or persons (or as to a class, any person or persons who are or will become members of such class) to whom the trustees may distribute principal at the time of the exercise of the power, provided however that the interest of a beneficiary to whom income, but not principal, may be distributed in the discretion of the trustee of the invaded trust may be continued in the appointed trust.

(5) The term "invade" shall mean the power to pay directly to the beneficiary of a trust or make application for the benefit of the beneficiary.

(6) The term "invaded trust" means any existing irrevocable inter

vivos or testamentary trust whose principal is appointed under paragraph (b) or (c) of this section.

(7) The term "person or persons interested in the invaded trust" shall mean any person or persons upon whom service of process would be required in a proceeding for the judicial settlement of the account of the trustee, taking into account section three hundred fifteen of the surrogate's court procedure act.

(8) The term "principal" shall include the income of the trust at the time of the exercise of the power that is not currently required to be distributed, including accrued and accumulated income.

(9) The term "unlimited discretion" means the unlimited right to distribute principal that is not modified in any manner. A power to pay principal that includes words such as best interests, welfare, comfort, or happiness shall not be considered a limitation or modification of the right to distribute principal.

(10) The creator shall not be considered to be a beneficiary of an invaded or appointed trust by reason of the trustee's authority to pay trust principal to the creator pursuant to section 7-1.11 of this chapter or by reason of the trustee's authority under the trust instrument or any other provision of law to pay or reimburse the creator for any tax on trust income or trust principal that is payable by the creator under the law imposing such tax or to pay any such tax directly to the taxing authorities.

(t) Cross-reference. For the exercise of the power under paragraph (b) or (c) of this section where there are multiple trustees, see sections 10-6.7 and 10-10.7 of this article.

### **§ 10-6.7 Exercise by all donees; exceptions**

Whenever a power of appointment, other than a power in a trustee to invade trust principal under section 10-6.6 of this article or under the terms of the dispositive instrument, is created in two or more donees, all must unite in its exercise, unless the instrument creating such power provides otherwise. But, if before its execution, one or more of such donees dies or becomes incompetent, such power may be exercised by the survivor or the competent donee, unless such exercise is explicitly

barred by the terms of the instrument creating such power.

#### **§ 10-6.8 Imperative power of appointment; effectuation**

(a) The exercise of an imperative power of appointment devolves upon the supreme court or, in the case of a will, the surrogate's court in the following cases:

- (1) Failure to designate the donee.
- (2) Death of the designated donee without exercising the power.
- (3) Incompetence of the sole donee.
- (4) Defective exercise of the power, either wholly or in part, by the donee.

(b) Where an imperative power of appointment:

(1) Is exclusive, and the donee dies without exercising the power, it must be exercised for the benefit of all of the appointees equally.

(2) Has been exercised defectively by the donee, it may be properly exercised in favor of persons intended to be benefited by the donee.

(3) Has been exercised defectively by the donee, a purchaser for a valuable consideration claiming under such defective exercise is entitled to the same relief as a similar purchaser claiming under a defective disposition from an actual owner.

(4) Is non-exclusive, and the right of the appointee is assignable, creditors or assignees of such appointee can compel the exercise of such power for their benefit.

(5) Is non-exclusive, the committee of an appointee or his assignee for the benefit of creditors can compel the exercise of such power.

#### **§ 10-6.9. Exercise of a power of appointment in further trust**

If the donee of a power of appointment exercises the power in favor of the trustee of a trust under a will or deed other than that under which the power was created, and if said exercise is otherwise valid, the appointive property shall be paid over to and administered by the trustee of, and under the terms of, the trust under such will or deed and jurisdiction over said appointive property shall thereafter be in the court having jurisdiction of the trust under such will or deed.

## **PART 7. RIGHTS OF CREDITORS IN APPOINTIVE PROPERTY**

### **§ 10-7.1 Creditors of the donee; special power**

Property covered by a special power of appointment (or a general power of appointment that is exercisable solely for the support, maintenance, health and education of the donee within the meaning of sections 2041 and 2514 of the Internal Revenue Code) is not subject to the payment of the claims of creditors of the donee, his estate or the expenses of administering his estate.

### **§ 10-7.2 Creditors of the donee; general power presently exercisable**

Property covered by a general power of appointment (other than one exercisable solely for the support, maintenance, health and education of the donee within the meaning of sections 2041 and 2514 of the Internal Revenue Code) which is presently exercisable, or of a postponed power which has become exercisable, is subject to the payment of the claims of creditors of the donee, his estate and the expenses of administering his estate. It is immaterial whether the power was created in the donee by himself or by some other person, or whether the donee has or has not purported to exercise the power.

### **§ 10-7.3 Creditors of the donee; power subject to a condition**

A general power of appointment may be created subject to a condition precedent or subsequent, and until the condition is fulfilled, it is not subject to the provisions of 10-7.2.

### **§ 10-7.4 Creditors of the donee; general power not presently exercisable**

(a) Property covered by a general power of appointment which, when

created, is not presently exercisable is subject to the payment of the claims of creditors of the donee, his estate and the expenses of administering his estate, only:

(1) If the power was created by the donee in favor of himself; or

(2) If a postponed power becomes exercisable in accordance with the terms of the creating instrument, except in the case of a testamentary general power.

## **PART 8. RULE AGAINST PERPETUITIES AND ACCUMULATIONS AS AFFECTED BY POWERS OF APPOINTMENT**

### **§ 10-8.1 Rule against perpetuities; time at which permissible period begins**

(a) Where an estate is created by an instrument exercising a power of appointment, the permissible period of the rule against perpetuities begins:

(1) In the case of an instrument exercising a general power which is presently exercisable, on the effective date of the instrument of exercise.

(2) In all other cases, at the time of the creation of the power.

(b) Where the creator of a trust reserves to himself an unqualified power to revoke, the permissible period of the rule against perpetuities begins when the power to revoke terminates by reason of the death of the creator, by a release of such power or otherwise.

### **§ 10-8.2 Rule against perpetuities; law which determines permissible period**

In all cases covered by 10-8.1, the permissible period of the rule against perpetuities is determined by the law in effect when the power is exercised or the unqualified power to revoke is terminated, and not by the law in effect when the power was created.

### **§ 10-8.3 Rule against perpetuities; facts to be considered**

When the permissible period of the rule against perpetuities must be computed from the time of the creation of the power of appointment, facts and circumstances existing on the effective date of the instrument exercising the power shall be taken into account in determining the validity of interests created by the instrument exercising the power.

### **§ 10-8.4 Rule against accumulations; law determining validity in exercise of a power of appointment**

When a direction for the accumulation of income is contained in an instrument exercising a power, heretofore or hereafter created, the validity of such direction is determined by the law in effect when the power is exercised, and not by the law in effect when the power was created.

## **PART 9. REVOCATION AND RELEASE OF A POWER OF APPOINTMENT**

### **§ 10-9.1 Revocability of a power of appointment**

(a) A power of appointment is irrevocable unless the donor reserves the right to revoke it.

(b) An exercise of power of appointment is irrevocable whenever:

(1) The donor of a special power manifests his intention that its exercise be irrevocable, or

(2) The donee does not manifest in the instrument exercising the power his intention to reserve a power of revocation.

(c) If the donee in exercising a power reserves a power to revoke the appointment, but does not expressly reserve a power to reappoint, upon the exercise of the power of revocation, the donee can reappoint.

(d) An instrument exercising a power of appointment is affected by fraud in the same manner as a deed or will, executed by an owner or by a trustee of property.

## **§ 10-9.2 Release of a power of appointment**

(a) Any power of appointment, whether exercisable only by deed, only by will, or by either deed or will, and whether general or special, exclusive or nonexclusive other than a power which is imperative, is releasable, either with or without consideration, by written instrument signed by the donee of such power and delivered as hereinafter provided.

(b) A releasable power of appointment may be released with respect to all or any part of the appointive property and may also be released in such manner as to reduce or limit the appointees, or classes of appointees, in whose favor such power is exercisable. No release of any power of appointment shall cause the power to become imperative when such power was not imperative prior to such release, unless the instrument of release expressly so provides.

(c) Such release may be delivered to any of the following:

(1) Any person specified for such purpose in the instrument creating the power.

(2) Any trustee of the property subject to such power.

(3) Any person, other than the donee, who might be adversely affected by an exercise of the power.

(4) The county clerk of the county in which the donee resides or has a place of business or in which the instrument creating the power is filed, to be duly filed by such clerk upon the payment to him of the fees due for such filing or, if the power was created by will, to the clerk of the surrogate's court having jurisdiction of the estate of the donor.

(d) This section applies to releases delivered on or after July first, nineteen hundred forty-two.

## **PART 10. PROVISIONS AFFECTING POWERS OTHER THAN POWERS OF APPOINTMENT**

### **§ 10-10.1 Power to distribute principal or allocate income; restriction on exercise**

A power held by a person as trustee of an express trust to make a discretionary distribution of either principal or income to such person as a beneficiary, or to make discretionary allocations in such person's favor of receipts or expenses as between principal and income, cannot be exercised by such person unless (1) such person is the grantor of the trust and the trust is revocable by such person during such person's lifetime, or (2) the power is a power to provide for such person's health, education, maintenance or support within the meaning of sections 2041 and 2514 of the Internal Revenue Code, or (3) the trust instrument, by express reference to this section, provides otherwise. If the power is conferred on two or more trustees, it may be exercised by the trustee or trustees who are not so disqualified. If there is no trustee qualified to exercise the power, its exercise devolves on the supreme court or the surrogate's court, except that if the power is created by will, its exercise devolves on the surrogate's court having jurisdiction of the estate of the donor of the power.

#### **§ 10-10.2 Power to lease in tenant for life; scope**

A power may be conferred upon a tenant for life to make leases of real property for a term of not more than twenty-one years to commence in possession during his lifetime. If the power authorizes, or the life tenant makes, a lease for a term in excess of twenty-one years, such power or lease is valid for twenty-one years, but is void as to the excess.

#### **§ 10-10.3 Power to lease in tenant for life; transfer and extinguishment**

The power of a tenant for life to make leases is not assignable as a separate interest, but is annexed to his estate and passes by a disposition of such estate unless expressly excepted. If so excepted, it is extinguished. Such a power may be released by the tenant to a person entitled to a future estate in the property, and shall thereupon be extinguished.

#### **§ 10-10.4 Power to lease in tenant for life; effect of mortgage**

(a) The power of a tenant for life to make leases is neither extinguished nor suspended when such tenant executes a mortgage. The power is bound by the mortgage in the same manner as the real property embraced therein, and the lien of the mortgagee on such power:

(1) Entitles the mortgagee to an exercise of the power so far as the satisfaction of the debt requires; and

(2) Causes any subsequent interest, created by the tenant for life by an exercise of such power, to become subject to the mortgage as if in terms embraced therein.

#### **§ 10-10.5 Power to sell in a mortgage**

Where a power to sell real property is given to a mortgagee or to the transferee in any other conveyance intended to secure the payment of money, the power is deemed a part of the security, and passes to and may be exercised by any person, who by assignment or otherwise, becomes entitled to the money so secured to be paid.

#### **§ 10-10.6 Effect of reserved unqualified power to revoke**

Where a creator reserves an unqualified power of revocation, he remains the absolute owner of the property disposed of so far as the rights of his creditors or purchasers are concerned.

#### **§ 10-10.7 Exercise of powers by multiple fiduciaries; joint and several powers**

Unless contrary to the express provisions of an instrument affecting the disposition of property, a joint power other than a power of appointment but including a power in a trustee to invade trust principal under section 10-6.6 of this article or under the terms of the

dispositive instrument, conferred upon three or more fiduciaries, as that term is defined in 11-1.1, by the terms of such instrument, or by statute, or arising by operation of law, may be exercised by a majority of such fiduciaries, or by a majority of survivor fiduciaries, or by the survivor fiduciary. Such a power conferred upon or surviving to two such fiduciaries may be exercised jointly by both such fiduciaries or by the survivor fiduciary, unless contrary to the express terms of the instrument creating the power. A fiduciary who fails to act through absence or disability, or a dissenting fiduciary who joins in carrying out the decision of a majority of the fiduciaries if his or her dissent is expressed promptly in writing to his or her co-fiduciaries, shall not be liable for the consequences of any majority decision, provided that liability for failure to join in administering the estate or trust or to prevent a breach of the trust may not thus be avoided. A power vested in one or more persons under a trust of real property created in connection with the salvaging of mortgage participation certificates may be executed by one or more of such persons as provided in such trust. This section shall not affect the right of any one of two or more personal representatives of a decedent to exercise a several power.

#### **§ 10-10.8 Irrevocability of powers other than powers of appointment**

A power, other than a power of appointment, is irrevocable unless an authority to revoke it is granted or reserved in the instrument creating the power.

### **ARTICLE 11**

#### **FIDUCIARY: POWERS, DUTIES AND LIMITATIONS; ACTIONS BY OR AGAINST IN REPRESENTATIVE OR INDIVIDUAL CAPACITIES**

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## **PART 1. FIDUCIARIES: POWERS, DUTIES AND LIMITATIONS**

### **§ 11-1.1 Fiduciaries' powers**

(a) As used in this section, unless the context or subject matter otherwise requires, (1) the term "estate" means the estate of a decedent; (2) the term "trust" means any express trust of property, created by a will, deed or other instrument, whereby there is imposed upon a trustee the duty to administer property for the benefit of a named or otherwise described income or principal beneficiary, or both. A trust shall not include trusts for the benefit of creditors, resulting or constructive trusts, business trusts where certificates of beneficial interest are issued to the beneficiary, investment trusts, voting trusts, security instruments such as deeds of trust and mortgages, trusts created by the judgment or decree of a court, liquidation or reorganization trusts, trusts for the sole purpose of paying dividends, interest, interest coupons, salaries, wages, pensions or profits, instruments wherein persons are mere nominees for others, or trusts created in deposits in any banking institution or savings and loan institution; (3) the term "fiduciary" means administrators, executors, preliminary executors, administrators d.b.n., administrators c.t.a.d.b.n., administrators c.t.a., ancillary executors, ancillary administrators, ancillary administrators c.t.a and trustees of express trusts, including a corporate as well as a natural person acting as fiduciary, and a successor or substitute fiduciary, whether designated

in a trust instrument or otherwise.

(b) In the absence of contrary or limiting provisions in the court order or decree appointing a fiduciary, or in a subsequent order or decree, or in the will, deed or other instrument, every fiduciary is authorized:

(1) To accept additions to any estate or trust from sources other than the estate of the decedent or the settlor of a trust.

(2) To acquire the remaining undivided interest in the property of an estate or trust in which the fiduciary, in his fiduciary capacity, holds an undivided interest.

(3) To invest and reinvest property of the estate or trust under the provisions of the will, deed or other instrument or as otherwise provided by law.

(4) To effect and keep in force fire, rent, title, liability, casualty or other insurance to protect the property of the estate or trust and to protect the fiduciary.

(5) With respect to any property or any estate therein owned by an estate or trust, except where such property or any estate therein is specifically disposed of:

(A) To take possession of, collect the rents from and manage the same.

(B) To sell the same at public or private sale, and on such terms as in the opinion of the fiduciary will be most advantageous to those interested therein.

(C) With respect to fiduciaries other than a trustee, to lease the same for a term not exceeding three years and, in the case of a trustee, to lease the same for a term not exceeding ten years although such term extends beyond the duration of the trust and, in either of such cases, including the right to explore for and remove mineral or other natural resources, and in connection with mineral leases to enter into pooling and unitization agreements.

(D) To mortgage the same.

(E) Any power to take possession of, collect the rent from, manage, sell, lease or mortgage, granted by this subparagraph (5), which is prohibited by the terms of the will, deed or other instrument or by the provisions of this subparagraph (5), nonetheless exists, upon the approval of the surrogate, where such power is necessary for the purposes set forth in SCPA 1902.

(F) A fiduciary acting under a will may exercise all of the powers granted by this subparagraph (5) notwithstanding the effect upon such will of the birth of a child after its execution or of any election by a surviving spouse.

(6) To make ordinary repairs to the property of the estate or trust.

(7) To grant options for the sale of property for a period not exceeding six months.

(8) With respect to any mortgage held by the estate or trust (A) to continue the same upon and after maturity, with or without renewal or extension, upon such terms as the fiduciary deems advisable; (B) to foreclose, as an incident to collection of any bond or note, any mortgage securing such bond or note, and to purchase the mortgaged property or acquire the property by deed from the mortgagor in lieu of foreclosure.

(9) To employ any bank or trust company incorporated in this state, any national bank located in this state or any private banker duly authorized by the superintendent of financial services of this state to engage in business here (who, as private banker, maintains a permanent capital of not less than one million dollars) as custodian of any stock or other securities held as a fiduciary, and the cost thereof, except in the case of a corporate fiduciary, shall be a charge upon the estate or trust. The records of such bank, trust company or private banker shall at all times show the ownership of such stock or other securities. Such stock or other securities shall at all times be kept separate from the assets of such bank, trust company or private banker and may be kept by such bank, trust company or private banker

(A) in a manner such that all certificates representing the securities from time to time constituting the assets of a particular estate, trust or other fiduciary account are held separate from those of all other estates, trusts or accounts; or

(B) in a manner such that, without certification as to ownership attached, certificates representing securities of the same class of the same issuer and from time to time constituting assets of particular estates, trusts or other fiduciary accounts are held in bulk, including, to the extent feasible, the merging of certificates of small denomination into one or more certificates of large denomination, provided that a bank, trust company or private banker, when operating

under the method of safekeeping security certificates described in this subparagraph (B), shall be subject to such rules and regulations as, in the case of state chartered institutions, the state superintendent of financial services and, in the case of national banking associations, the comptroller of the currency may from time to time issue. Such bank, trust company or private banker shall, on demand by the fiduciary, certify in writing the securities held by it for such estate, trust or fiduciary account.

(10) To cause any stock or other securities (hereinafter referred to as "securities") held by any bank or trust company, when acting as fiduciary, whether alone or jointly with an individual, with the consent of the individual fiduciary, if any (who is hereby authorized to give such consent), to be registered and held in the name of a nominee of such bank or trust company without disclosure of the fiduciary relationship; and, in the case of an individual acting as fiduciary, to direct any bank or trust company incorporated under the laws of this state, any national bank located in this state or any private banker duly authorized by the superintendent of financial services of this state to engage in business here (who, as private banker, maintains a permanent capital of not less than one million dollars) to register and hold any securities deposited with such bank, trust company or private banker (hereinafter referred to as "bank") in the name of a nominee of such bank. The bank shall not redeliver such securities to the individual fiduciary, who authorized their registration in the name of a nominee of the bank, without first registering the securities in the name of the individual fiduciary, as such. But, any sale of such securities by the bank at the direction of the individual fiduciary shall not be treated as a redelivery. The bank may make any disposition of such securities which is authorized or directed by an order or decree of the court having jurisdiction of the estate or trust. Any such bank shall be absolutely liable for any loss occasioned by the acts of its nominee with respect to the securities so registered. The records of the bank shall at all times show the ownership of any such securities and of those held in bearer form. Such securities and those held in bearer form shall at all times be kept separate from the assets of the bank and may be kept by such bank

(A) in a manner such that all certificates representing the securities

from time to time constituting the assets of a particular estate, trust or other fiduciary account are held separate from those of all other estates, trusts or accounts; or

(B) in a manner such that, without certification as to ownership attached, certificates representing securities of the same class of the same issuer and from time to time constituting assets of particular estates, trusts or other fiduciary accounts are held in bulk, including, to the extent feasible, the merging of certificates of small denomination into one or more certificates of large denomination, provided that a bank, when operating under the method of safekeeping security certificates described in this subparagraph (B), shall be subject to such rules and regulations as, in the case of state chartered institutions, the state superintendent of financial services and, in the case of national banking associations, the comptroller of the currency may from time to time issue. Such bank or trust company shall, on demand by any party to an accounting by such bank or trust company as fiduciary or on demand by the attorney for such party, certify in writing the securities held by such bank or trust company as such fiduciary.

(11) In the case of the survivor of two or more fiduciaries, to continue to administer the property of the estate or trust without the appointment of a successor to the fiduciary who has ceased to act and to exercise or perform all of the powers given to the original fiduciaries unless contrary to the express provision of the will, deed or other instrument.

(12) As successor or substitute fiduciary, to succeed to all of the powers, duties and discretion of the original fiduciary, with respect to the estate or trust, as were given to the original fiduciary, unless the exercise of such powers, duties or discretion of the original fiduciary are expressly prohibited by the will, deed or other instrument to any successor or substituted fiduciary.

(13) To contest, compromise or otherwise settle any claim in favor of the estate, trust or fiduciary or in favor of third persons and against the estate, trust or fiduciary.

(14) To vote in person or by proxy, discretionary or otherwise, shares of stock or other securities held by him as fiduciary.

(15) To pay calls, assessments and any other sums chargeable or accruing against or on account of shares of stock, bonds, debentures or

other corporate securities held by a fiduciary, whenever such payments may be legally enforceable against the fiduciary or any property of the estate or trust or the fiduciary deems payment expedient and for the best interests of the estate or trust.

(16) To sell or exercise stock subscription or conversion rights, participate in foreclosures, reorganizations, consolidations, mergers or liquidations, and to consent to corporate sales, leases and encumbrances. In the exercise of such powers the fiduciary is authorized to deposit stocks, bonds or other securities with any protective or other similar committee under such terms and conditions respecting the deposit thereof as the fiduciary may approve.

(17) To execute and deliver agreements, assignments, bills of sale, contracts, deeds, notes, receipts and any other instrument necessary or appropriate for the administration of the estate or trust.

(18) In the case of a trustee, to hold the property of two or more trusts or parts of such trusts created by the same instrument as an undivided whole without separation as between such trusts or parts, provided that such separate trusts or parts shall have undivided interests and provided further that no such holding shall defer the vesting of any estate in possession or otherwise.

(19) When a legacy, a distributive share, the proceeds of any action brought as prescribed by 5-4.1, or the proceeds of a settlement of an action brought in behalf of an infant for personal injuries are payable to an infant, incompetent, conservatee or person under disability and the sum does not exceed ten thousand dollars, to make payment thereof to the father or mother or to some competent adult person with whom the infant, incompetent, conservatee or person under disability resides or who has some interest in his welfare for the use and benefit of such infant, incompetent, conservatee or person under disability. If the sum payable to a patient in an institution in the state department of mental hygiene is not in excess of the amount which the director of the institution is authorized to receive under section 29.23 of the mental hygiene law, to make payment of such sum to such director for use as provided in that section.

(20) To make distribution in cash, in kind valued at the fair market value of the property at the date of distribution, or partly in each, without being required to make pro rata distributions of specific

property.

(21) To join with the surviving spouse or the executor of his will or the administrator of his estate in the execution and filing of a joint income tax return for any period prior to the death of a decedent for which he has not filed a return or a gift tax return on gifts made by the decedent's surviving spouse, and to consent to treat such gifts as being made one-half by the decedent, for any period prior to a decedent's death, and to pay such taxes thereon as are chargeable to the decedent.

(22) In addition to those expenses specifically provided for in this paragraph, to pay all other reasonable and proper expenses of administration from the property of the estate or trust, including the reasonable expense of obtaining and continuing his bond and any reasonable counsel fees he may necessarily incur.

(c) The court having jurisdiction of the estate or trust may authorize the fiduciary to exercise any other power which in the judgment of the court is necessary for the proper administration of the estate or trust.

(d) The powers set forth in this section shall apply to all estates and trusts now in existence or which may hereafter come into existence and are in addition to the powers granted by law or by the will, deed or other instrument.

### **§ 11-1.2 Tax elections by personal representatives**

(A) If the personal representative or other person acting in a fiduciary capacity with respect to a decedent's estate, hereinafter called the "fiduciary", claims as income tax reductions administration expenses chargeable to principal that may be claimed by such fiduciary as either estate tax deductions or as income tax deductions with the result that the income taxes paid by or chargeable to income or to any income beneficiary are reduced and with the further result that United States or New York estate taxes chargeable to principal are increased, then, unless otherwise provided or authorized by the decedent's will, each person, including the estate or any trust, who has received the use of such income tax deductions shall reimburse to the principal chargeable with such increased estate taxes an amount determined by multiplying such increase in estate taxes by a fraction having a

numerator equal to the income tax deduction made available to him as the result of the aforesaid election and a denominator equal to the total amount of the income tax deductions made available thereby.

(b) Unless otherwise expressly provided by a will under which a disposition is made to or for the benefit of the surviving spouse of a decedent which qualifies for an estate tax marital deduction under any tax law of the state of New York or of the United States and the amount or size of such disposition is defined by the will in terms of the maximum marital deduction allowable under such tax law:

(1) No adjustment shall be required to be made between such disposition and the other interests in the decedent's estate by reason of (A) any increase in the amount or size of such disposition resulting from any election by the fiduciary, under such tax laws, to treat estate administration expenses as income tax deductions over the amount or size of such disposition had the contrary election been made or (B) any increase or decrease in the amount or size of such disposition resulting from an election by the fiduciary, under such tax laws, of an estate tax valuation date other than the date of the decedent's death as compared with the amount or size of such disposition had the contrary election been made.

(2) Such definition shall not be construed as a direction by the decedent to the fiduciary to exercise any election respecting the deduction of estate administration expenses or the determination of the estate tax valuation date, which the fiduciary may have under such tax laws, only in such manner as will result in a larger allowable estate tax marital deduction than if the contrary election had been made.

### **§ 11-1.3 Power and duty of executor before probate**

An executor named in a will has no power to dispose of any part of the estate of the testator before letters testamentary or preliminary letters testamentary are granted, except to pay reasonable funeral expenses, nor to interfere with such estate in any manner other than to take such action as is necessary to preserve it.

**§ 11-1.4 Validity of execution of power to sell, mortgage or lease real property by less than all qualifying executors**

Any deed, mortgage or lease duly executed by one or more, but not all, of the executors or trustees who qualified conveys the full title and interest of the testator, and is as effective as if all the executors or trustees who qualified had joined in the execution thereof, when ten years have elapsed since the recording of such deed, mortgage or lease in the county where the property affected is situated; saving, however, the rights of every grantee, mortgagee or lessee, in good faith and for a valuable consideration, deriving title under an instrument executed by all the executors or trustees who qualified to the same property or any part thereof, whose deed, mortgage or lease is duly recorded before such period of ten years has elapsed.

**§ 11-1.5 Payment of testamentary dispositions or distributive shares**

(a) Subject to his or her duty to retain sufficient assets to pay administration and reasonable funeral expenses, debts of the decedent and all taxes for which the estate is liable, a personal representative may, but, except as directed by will or court decree or order, shall not be required to, pay any testamentary disposition or distributive share before the completion of the publication of notice to creditors or, if no such notice is published, before the expiration of seven months from the time letters testamentary or of administration are granted, or, if notice of the availability of genetic material of the decedent has been given under section 4-1.3, before the birth of a genetic child who is entitled to inherit from the decedent under section 4-1.3.

(b) Whenever a disposition is directed by will to be paid in advance of such publication of notice or the expiration of such seven month period or the birth of a genetic child entitled to inherit from the decedent under section 4-1.3, the personal representative may require a bond, conditioned as follows:

(1) That if debts of the decedent appear, and the assets of the estate are insufficient to pay them or to pay other testamentary dispositions entitled, under section 13-1.3, to payment equally with or prior to that of the disposition paid in advance, the beneficiary to whom advance

payment was made will refund it, or the value thereof, together with interest thereon and any costs incurred by reason of such payment, or such ratable portion thereof, as is necessary to pay such debts or to satisfy the rights, if any, of other beneficiaries under the will.

(2) That if the will, under which the disposition was paid, is denied probate, on appeal or otherwise, such beneficiary will refund the entire advance payment, together with interest and costs as described in subparagraph (1), to the personal representative entitled thereto.

(c) If, after the expiration of seven months from the time letters are granted or the birth of a genetic child entitled to inherit from the decedent under section 4-1.3, as the case may be, the personal representative refuses upon demand to pay a disposition or distributive share, the person entitled thereto may maintain an appropriate action or proceeding against such representative. But, for the purpose of computing the time limited for its commencement, the cause of action does not accrue until the personal representative's account is judicially settled.

#### **§ 11-1.6 Property held as fiduciary to be kept separate**

(a) Every fiduciary shall keep property received as fiduciary separate from his individual property. He shall not invest or deposit such property with any corporation or other person doing business under the banking law, or with any other person or institution, in his own name, but all transactions by him affecting such property shall be in his name as fiduciary; provided, however, that any bank or trust company, when acting as fiduciary, whether alone or jointly with an individual, may with the consent of the individual fiduciary, if any (who is hereby authorized to give such consent), register and hold stock or other securities (referred to in this section as "securities") in the name of the nominee of such bank or trust company; and provided, further, that any individual acting as fiduciary is authorized to direct any bank or trust company incorporated under the laws of this state, any national bank located in this state or any private banker duly authorized by the superintendent of financial services of this state to engage in business here (who, as private banker, maintains a permanent capital of not less than one million dollars) to register and hold any securities in the

name of a nominee of such bank, trust company or private banker (referred to in this section as "bank"). Such bank shall not redeliver such securities to the individual fiduciary, who authorized their registration in the name of a nominee of the bank, without first registering the securities in the name of the individual fiduciary, as such. But, any sale of such securities by the bank at the direction of the individual fiduciary shall not be treated as a redelivery. The bank may make any disposition of such securities which is authorized or directed by an order or decree of the court having jurisdiction of the estate or trust.

(b) Any bank shall be absolutely liable for any loss occasioned by the acts of its nominee with respect to the securities so registered.

(c) The records of such bank shall at all times show the ownership of any such securities and of those held in bearer form. Such securities and those held in bearer form shall at all times be kept separate from the assets of the bank and may be kept by such bank

(A) in a manner such that all certificates representing the securities from time to time constituting the assets of a particular estate, trust or other fiduciary account are held separate from those of all other estates, trusts or other fiduciary accounts; or

(B) in a manner such that, without certification as to ownership attached, certificates representing securities of the same class of the same issuer and from time to time constituting assets of particular estates, trusts or other fiduciary accounts are held in bulk, including, to the extent feasible, the merging of certificates of small denomination into one or more certificates of large denomination, provided that a bank, when operating under the method of safekeeping security certificates described in this subparagraph (B), shall be subject to such rules and regulations as, in the case of state chartered institutions, the state superintendent of financial services and, in the case of national banking associations, the comptroller of the currency may from time to time issue. Such banks shall, on demand by the fiduciary, certify in writing the securities held for such fiduciary.

(d) Any person violating any of the provisions of this section shall be guilty of a misdemeanor.

(e) This section shall apply to all estates and trusts now in existence or which may hereafter come into existence.

**§ 11-1.7 Limitations on powers and immunities of executors and testamentary trustees**

(a) The attempted grant to an executor, testamentary trustee, or inter vivos trustee, or his or her successor, of any of the following enumerated powers or immunities is contrary to public policy:

(1) The exoneration of such fiduciary from liability for failure to exercise reasonable care, diligence and prudence.

(2) The power to make a binding and conclusive fixation of the value of any asset for purposes of distribution, allocation or otherwise.

(b) The attempted grant in any will or trust of any power or immunity in contravention of the terms of this section shall be void but shall not be deemed to render such will or trust invalid as a whole, and the remaining terms of the instrument shall, so far as possible, remain effective.

(c) Any person interested in an estate or trust may contest the validity of any purported grant of any power or immunity within the purview of this section without diminishing or affecting adversely his or her interest in the estate or trust any provision in any will or trust to the contrary notwithstanding.

**§ 11-1.8 Power of fiduciary or custodian for fiduciary to deposit United States government and agency securities with a federal reserve bank**

(a) Notwithstanding any other provision of law, any bank or trust company, when acting as fiduciary and any bank, trust company or private banker, when holding securities as custodian for a fiduciary pursuant to § 11-1.1(b) (9), is authorized to deposit, or arrange through a subcustodian or otherwise for the deposit, with the federal reserve bank in its district of any securities the principal and interest of which the United States or any department, agency or instrumentality thereof has agreed to pay, or has guaranteed payment, to be credited to one or more accounts on the books of said federal reserve bank in the name of such bank, trust company or private banker, to be designated fiduciary or safekeeping accounts, to which account other similar securities may

be credited. A bank, trust company or private banker so depositing securities with a federal reserve bank shall be subject to such rules and regulations with respect to the making and maintenance of such deposit as, in the case of state chartered institutions, the state superintendent of financial services, and, in the case of national banking associations, the comptroller of the currency, may from time to time issue. The records of such bank, trust company or private banker shall at all times show the ownership of the securities held in such account. Ownership of, and other interests in, the securities credited to such account may be transferred by entries on the books of said federal reserve bank without physical delivery of any securities. A bank, trust company or private banker acting as custodian for a fiduciary shall, on demand by the fiduciary, certify in writing to the fiduciary the securities so deposited by such bank, trust company or private banker with such federal reserve bank for the account of such fiduciary. A fiduciary shall, on demand by any party to its accounting or on demand by the attorney for such party, certify in writing to such party the securities deposited by such fiduciary with such federal reserve bank for its account as such fiduciary.

(b) This section shall apply to all fiduciaries, and custodians for fiduciaries, acting on the effective date of this section or who thereafter may act regardless of the date of the instrument or court order by which they are appointed.

#### **§ 11-1.9 Power of Fiduciary or Custodian to Deposit Securities in a Central Depository**

(a) Notwithstanding any other provision of law, any fiduciary (as defined in section 1-2.7) holding securities in its fiduciary capacity, any bank, trust company or private banker holding securities as a custodian or managing agent, and any bank, trust company or private banker holding securities as custodian for a fiduciary pursuant to section 11-1.1 (b)(9), is authorized to deposit or arrange through a subcustodian or otherwise for the deposit of such securities in a clearing corporation (as defined in article eight of the Uniform Commercial Code). When such securities are so deposited, certificates representing securities of the same class of the same issuer may be

merged and held in bulk in the name of the nominee of such clearing corporation with any other such securities deposited in such clearing corporation by any person regardless of the ownership of such securities, and certificates of small denomination may be merged into one or more certificates of larger denomination. The records of such fiduciary and the records of such bank, trust company or private banker acting as custodian, as managing agent or as custodian for a fiduciary shall at all times show the name of the party for whose account the securities are so deposited. Ownership of, and other interests in, such securities may be transferred by bookkeeping entry on the books of such clearing corporation without physical delivery of certificates representing such securities. A bank, trust company or private banker so depositing securities pursuant to this section shall be subject to such rules and regulations as, in the case of state chartered institutions, the state superintendent of financial services and, in the case of national banking associations, the comptroller of the currency may from time to time issue. A bank, trust company or private banker acting as custodian for a fiduciary shall, on demand by the fiduciary, certify in writing to the fiduciary the securities so deposited by such bank, trust company or private banker in such clearing corporation for the account of such fiduciary. A fiduciary shall, on demand by any party to a judicial proceeding for the settlement of such fiduciary's account or on demand by the attorney for such party, certify in writing to such party the securities deposited by such fiduciary in such clearing corporation for its account as such fiduciary.

(b) This section shall apply to any fiduciary holding securities in its fiduciary capacity, and to any bank, trust company or private banker holding securities as a custodian, managing agent or custodian for a fiduciary, acting on the effective date of this section or who thereafter may act regardless of the date of the agreement, instrument or court order by which it is appointed and regardless of whether or not such fiduciary, custodian, managing agent or custodian for a fiduciary owns capital stock of such clearing corporation.

#### **§ 11-1.10 Power of fiduciary to employ a broker-dealer as custodian**

Notwithstanding any other provision of law any fiduciary (as defined in section 1-2.7 or 11-1.1 (a) (3)) is authorized: (1) to employ any broker-dealer which is registered with the Securities and Exchange Commission and the department of law of the state of New York (referred to in this section as "broker") as a custodian for a fiduciary of any stock or other securities (referred to in this section as "securities"); (2) to register such securities in the name of such broker. Such broker shall have the same power and shall be subject to the same restrictions with respect to the treatment of such securities as any bank or trust company acting as a custodian for a fiduciary and such securities shall be subject to the same treatment as securities held by such a custodian for a fiduciary as provided in sections 11-1.1 (b) (9) (10), 11-1.6, 11-1.8, and 11-1.9 of this part. Any such securities held by a broker in which the broker does not have a lien for indebtedness due to it from the estate or trust may not be pledged, lent, hypothecated or disposed of except upon the specific instruction of the fiduciary.

**§ 11-1.11 Limited power of fiduciary to amend trust for certain tax purposes**

(a) Unless expressly prohibited by the terms of the instrument creating an express trust, the terms of the trust instrument shall be deemed to include the following provision granting the trustee, which term as defined in paragraph (h) of this section may mean the executor or administrator, a limited power to amend:

"The trustees shall have the limited power to amend the administrative and other provisions of the trust which have no significant dispositive effects within the meaning of paragraph (i) of this section on an interest described in such paragraph, by an acknowledged instrument in writing, in order to:

(i) achieve a qualified reformation of a reformable interest into a qualified interest for purposes of the charitable deduction as permitted by section 2055(e)(3) or 2522(c)(4) of the United States Internal Revenue Code ("Code") and the regulations thereto, or achieve a reformation of a charitable remainder trust permitted by section 664 of the Code and the regulations thereto;

(ii) meet the requirements of a qualified domestic trust for a

surviving spouse who is not a citizen of the United States under sections 2056(d) and 2056A(a) of the Code and the regulations thereto; and

(iii) meet the requirements of a personal residence trust under section 2702(a)(3) or to meet the definition of a qualified interest under section 2702(b) of the Code, and the regulations thereto."

(b) (1) No trustee may exercise any power created under paragraph (a) of this section with respect to any trust that is exempt from tax imposed by the provisions of chapter 13 of the Code or has an inclusion ratio, as defined in section 2642(a) of the Code, of zero if the exercise of such power would cause such trust to lose in whole or in part its exemption from the tax imposed by the provisions of chapter 13 of the Code or cause such trust to have an inclusion ratio, as defined in section 2642(a) of the Code, of more than zero.

(2) If the creator of an express trust or a beneficiary (whether current, future or contingent) of income or principal of an express trust is serving as a trustee of the express trust, the creator or such beneficiary cannot participate in the exercise of the power to amend such express trust pursuant to this section. If two or more trustees are serving, the power to amend such express trust may be exercised by the trustees who are not so disqualified.

(c) Such amendment shall be embodied in one or more writings signed and acknowledged in the manner required by the laws of this state for the recording of a conveyance of real property by the trustee and filed in the office of the clerk of the court having jurisdiction over the instrument. At least thirty (30) days prior to such filing, notice of such amendment, together with a copy of the amendment, shall be sent by registered or certified mail, return receipt requested, or by personal delivery to all persons interested in the trust, or to the guardian of the property, committee, conservator, adult guardian, or personal representative of any such persons under a disability, or to the parent or person with whom a minor resides. Such notice shall include the following statement: "If you wish to object to the proposed amendment, you should notify the trustee (executor or administrator) of your objections in a writing signed and acknowledged by you before a notary in the manner required by the laws of the state of New York for the recording of a conveyance of real property. Such written objection must

be personally delivered or mailed to the trustee (executor or administrator) by registered or certified mail, return receipt requested, within thirty (30) days of the date when the notice was personally delivered or mailed to you. If no such objection to the proposed amendment is made by any person interested in the trust, such amendment will become effective upon its filing in the court having jurisdiction over the trust." Proof by affidavit of such mailing or delivery of the notice or by signed acknowledgement of receipt by the person noticed, shall be filed in the office of the clerk of the court where such amendment is filed prior to or simultaneously with the filing of such amendment. If it appears by affidavit that the name or address of any person interested in the trust is unknown, mailing to such person of the notice shall not be required.

(d) Such amendment shall be effective upon filing as required by paragraph (c) of this section, provided that no written objection to such amendment, signed and acknowledged in the manner required by the laws of the state for the recording of a conveyance of real property by any person interested in the trust, has been received prior to such filing by the trustee, by personal delivery or by registered or certified mail, return receipt requested. If no such written objection has been received by the trustee prior to such filing, no judicial proceeding or consent of any person interested in the trust shall be required.

(e) Unless otherwise provided in the amendment, the amendment shall be deemed to have been effective in the case of a will as of the date of death of the decedent, and in the case of any other instrument on the date it became irrevocable.

(f) The limited power to amend granted by this section shall be exercised only if acted upon by all of the trustees, except as otherwise provided by subparagraph (b)(2) of this section.

(g) For the purposes of this section, the phrase "all persons interested in the trust" shall mean all the persons upon whom service of process would be required in a proceeding for the judicial settlement of the account of the trustee, taking into account section three hundred fifteen of the surrogate's court procedure act.

(h) In any case where the Code requires that an election or other action be made or taken by the executor or if no trustee of a trust

under a will has qualified, the term "trustee" as used in this section shall mean the executor or administrator of an estate. In any such case, the trustee shall comply with any action taken by the executor or administrator under this section.

(i) An amendment pursuant to paragraph (a) of this section shall be conclusively deemed to have "no significant dispositive effect" if the difference between the actuarial value determined as of the effective date of the amendment

(i) of the interest reformed pursuant to subparagraph (a)(i) or (a)(ii) qualifying for the marital or charitable deduction which is involved in a reformation pursuant to subparagraph (a)(i) or (a)(ii); or

(ii) of the interest retained by the transferor or any applicable family member reformed pursuant to subparagraph (a)(iii) in order to qualify as a "personal residence trust" or a "qualified interest" under section 2702 of the Code;

and the actuarial value of the respective interest prior to such amendment does not exceed five percent of the actuarial value of such pre-amendment interest.

(j) The term "trust" shall include an arrangement treated as a "trust" for the purposes of the Code.

(k) The fact that a testamentary trust cannot be revoked, altered or amended by reason of the testator's death, or that the will or trust instrument states that the trust is irrevocable and/or cannot be altered or amended, shall not be deemed to constitute an express prohibition within the meaning of the phrase "unless expressly prohibited by the terms of the instrument creating an express trust."

(l) References to sections of the United States Internal Revenue Code or Code shall refer to the United States Internal Revenue Code of 1986 as amended from time to time, or to corresponding provisions of subsequent internal revenue laws, and regulations thereto; and shall also refer to corresponding provisions of state law.

## **PART 2. INVESTMENTS BY FIDUCIARIES: POWERS AND DUTIES RELATING THERETO**

## **§ 11-2.1 Principal and income**

(a) Duty of trustee as to receipts and expenditures.

(1) A trust shall be administered with due regard to the respective interests of income beneficiaries and remaindermen. A trust is so administered with respect to the allocation of receipts and expenditures if a receipt is credited or an expense is charged to income or to principal or partly to each (A) in accordance with the terms of the trust instrument, notwithstanding any contrary provisions in this section; (B) in the absence of any contrary terms of the trust instrument, in accordance with the provisions of this section; or (C) if neither of the preceding rules of administration is applicable, in accordance with what is reasonable and equitable in view of the interests of those entitled to income as well as those entitled to principal and in view of the manner in which men of ordinary prudence, discretion and judgment would act in the management of their own affairs.

(2) If the trust instrument gives the trustee discretion in crediting a receipt or charging an expenditure to income or principal or partly to each, no inference that the trustee has or has not improperly exercised such discretion arises from the fact that the trustee has made an allocation contrary to the provisions of this section.

(b) What is income and what is principal; definitions.

(1) Income is the return in money or property derived from the use of principal, including return received as:

(A) Rent from property, including sums received for the cancellation or renewal of a lease.

(B) Interest on money lent, including sums received as consideration for the privilege of prepayment of principal except as provided in paragraph (f) on bond premium and discount.

(C) Income earned during the administration of a decedent's estate, as provided in paragraph (d).

(D) Corporate distributions, as provided in paragraph (e).

(E) Accrued income on bonds or other obligations issued at a discount, as provided in paragraph (f).

(F) Receipts from principal used in business, as provided in paragraph (g).

(G) Receipts from disposition of natural resources, as provided in

paragraphs (h) and (i).

(H) Receipts from other principal subject to depletion, as provided in paragraph (j).

(I) Receipts from disposition of underproductive property, as provided in paragraph (k).

(2) Principal is property, disposed of in trust, the income from which is payable to or to be accumulated for an income beneficiary and the title to which is ultimately to vest in the person entitled to the future estate. Principal includes:

(A) Consideration received by the trustee on the sale or other transfer of principal, on repayment of a loan or as a refund, replacement or change in the form of principal.

(B) Proceeds of property taken on eminent domain proceedings.

(C) Proceeds of insurance upon property forming part of the principal except proceeds of insurance upon a separate interest of an income beneficiary.

(D) Stock dividends, receipts on liquidation of a corporation and other corporate distributions, as provided in paragraph (e).

(E) Receipts with respect to bonds and other obligations, as provided in paragraph (f).

(F) Royalties and other receipts from disposition of natural resources, as provided in paragraphs (h) and (i).

(G) Receipts from other principal subject to depletion, as provided in paragraph (j).

(H) Any profit resulting from any change in the form of principal, except as provided in paragraph (k) on underproductive property.

(I) Receipts from disposition of underproductive property, as provided in paragraph (k).

(3) After determining income and principal in accordance with the terms of the trust instrument or of this section the trustee shall charge to income or principal expenses and other charges as provided in paragraph (l).

(c) When right to income arises; apportionment of income or other receipt.

(1) An income beneficiary is entitled to income from the date specified in the trust instrument or, if none is specified, from the date an asset becomes subject to the trust. In the case of an asset

which becomes subject to a trust by reason of a will, it becomes subject to the trust as of the date of the death of the testator even though there is an intervening period of administration of the testator's estate.

(2) In the case of a decedent's estate, a testamentary trust or an asset received under a will by a trustee: (A) receipts due but not paid at the date of death of the testator are principal; (B) receipts in the form of periodic payments (other than corporate distributions to stockholders and savings bank and savings and loan association dividends), such as rent, interest or annuities payable from any source, not due at the date of death of the testator, shall be treated as accruing from day to day. That portion of such a receipt accruing before the date of death is principal and the balance is income.

(3) In all other cases any receipt from an income producing asset is income even though the receipt was earned or accrued in whole or in part before the date when the asset became subject to the trust.

(4) On termination of an income interest, the income beneficiary whose interest is terminated or his estate is entitled to: (A) income undistributed on the date of termination; (B) income due but not paid to the trustee on the date of termination; (C) income in the form of periodic payments (other than corporate distributions to stockholders and savings bank and savings and loan association dividends) such as rent, interest or annuities, not due on the date of termination, accrued from day to day.

(d) Income earned during administration of a decedent's estate.

(1) Unless the will provides otherwise and subject to subparagraph (2) hereof, all expenses incurred in connection with the settlement of a decedent's estate, including but not limited to debts, funeral expenses, estate taxes, interest and penalties concerning taxes, family allowances, fees of attorneys and commissions of personal representatives (other than commissions on estate income) and court fees, costs and other charges shall be charged against the principal of the estate.

(2) Unless the will provides otherwise, income from the assets of a decedent's estate after the death of the testator and before distribution, including income from property used to discharge liabilities, shall be determined in accordance with the rules applicable

to a trustee under this section and distributed as follows: (A) to specific beneficiaries the net income from the property disposed of to them respectively; (B) to all other beneficiaries, except beneficiaries of pecuniary dispositions not in trust, the balance of the net income in proportion to their respective interests in the undistributed assets of the estate computed at times of distribution on the basis of inventory value; provided, however, (i) that the amount of income earned during the further administration of the estate from and after the date of payment of any estate or inheritance tax shall be distributed to such beneficiaries in proportion to their respective interests in the undistributed assets of the estate after the making of such payment on the basis of the fair market value of such assets immediately after the making of such payment, and (ii) any amount allowed as a tax deduction to the estate for income payable to a charitable organization shall be paid, without diminution for taxes, to the charitable organization entitled to receive such income. This subparagraph does not apply to any sums made payable in policies of insurance of any description or under any contract for an annuity, including a variable annuity.

(3) (A) The residuary beneficiaries are entitled to the rent from the decedent's real property, not specifically disposed of, from the date of death, in proportion to their respective interests under the will, unless the fiduciary, pursuant to a power to distribute in kind, allocates all or part of such property in whole or partial satisfaction of a pecuniary disposition in trust, in which event the rent from the property so allocated shall be distributed, as of the date of death, to the trustee of such disposition.

(B) This subparagraph applies to wills of decedents dying before, on or after its effective date, provided, however, that it shall not be so applied as to require residuary beneficiaries to repay to the estate any distributions of income from real property, not specifically disposed of, which were actually made to such beneficiaries prior to such effective date.

(4) Income and rent received by a trustee under subparagraphs (2) or (3) shall be treated as income of the trust.

(e) Distributions of corporations or associations.

(1) Notwithstanding the provisions of this paragraph, a will, deed or other instrument which creates or declares a trust may provide with

respect to all matters covered by this section, and direct the manner of ascertaining income and principal and the apportionment thereof or grant discretion to the trustee or another person to do so, and such provision or direction, where otherwise not contrary to law, controls.

(2) A distribution by a corporation or association made to a trustee in the shares of the distributing corporation or association held in such trust, whether in the form of a stock split or a stock dividend, at the rate of six per cent or less of the shares of such corporation or association upon which the distribution is made, is income. Any such distribution at a greater rate is principal.

(3) For the purpose of determining whether a will, deed or other instrument which creates or declares a trust has directed that a distribution of shares described in subparagraph (2) is income in a manner other than that provided in subparagraph (2), the following rules apply unless different rules are provided in the will, deed or other instrument:

(A) A distribution in the shares of the distributing corporation or association means a distribution in such shares, whether in the form of a stock split or a stock dividend, at the rate of six per cent or less of the shares of such corporation or association upon which the distribution is made.

(B) A distribution in the shares of the distributing corporation or association, whether in the form of a stock split or a stock dividend, at the rate of six per cent or less of the shares of such corporation or association upon which the distribution is made, is ordinary and regular and shall be deemed to be in lieu of a cash dividend.

(C) If the will, deed or other instrument which creates or declares a trust grants to the trustee or another person discretion to allocate to income or principal or between income and principal any distribution in the shares of the distributing corporation or association, such discretion may be exercised with respect to any such distribution in the shares of the distributing corporation or association, whether in the form of a stock split or a stock dividend, and no inference of imprudence or partiality shall arise from the fact that the trustee or other person has made an allocation contrary to a provision of subparagraph (2) or of this subparagraph.

(4) (A) A right issued by the distributing corporation or association

to subscribe to shares or other securities, whether in the stock or other securities of the distributing corporation or association or of a corporation or association other than the distributing corporation or association, accruing to shareholders on account of their stock ownership, and the proceeds of any sale of such rights, are principal.

(B) A distribution by a corporation or association made to a trustee in the shares of the distributing corporation, but of a different type than the shares held in such trust, or a distribution of shares, securities or obligations of a corporation or association other than those of the distributing corporation or association (or the proceeds of such a distribution) shall be principal.

(5) When a corporation or association calls in shares of stock or when a corporation or association succeeds another by merger, consolidation, reorganization or other method of acquiring its assets, shares of stock issued for the shares so called in or shares of stock in the succeeding corporation or association are principal.

(6) When a corporation or association is being wholly or partially liquidated, shares of stock and cash or other assets distributed to shareholders are principal, except that if the corporation or association indicates that some part of such distribution is a settlement of preferred or guaranteed dividends, that part of the distribution settling dividends accruing since the trustee became a shareholder is income. For the purposes of this paragraph, a corporation or association is in liquidation if the corporation or association indicates that the distribution is in total or partial liquidation, or if the corporation or association is making a distribution of assets other than cash pursuant to a court decree or final administrative order by a government agency ordering the distribution of the particular assets, unless the distributing corporation or association indicates that a distribution pursuant to such court or administrative order is wholly or partly in lieu of an ordinary cash dividend, in which case the distribution is to that extent income.

(7) Distributions made from ordinary income by a regulated investment company or by a trust qualifying and electing under federal law to be taxed as a real estate investment trust are income. All other distributions made by such company or trust, including distributions from capital gains, depreciation or depletion, whether in the form of

cash or an option to take new shares or cash or an option to purchase additional shares, are principal.

(8) If the distributing corporation or association gives a shareholder an option to receive a distribution, whether in the form of cash or its own shares or cash or an option to purchase new shares, the distribution chosen is income.

(9) Except as provided in subparagraphs (2), (4), (5), (6) and (7), all distributions of corporations or associations are income including:

(A) Cash dividends.

(B) Share distributions, as provided in subparagraphs (2) and (3).

(C) Preferred or guaranteed dividends, as provided in subparagraph (6).

(D) Ordinary income from a regulated investment trust or a trust qualifying and electing under federal law to be taxed as a real estate investment trust, as provided in subparagraph (7).

(E) An option, as provided in subparagraph (8).

(10) The trustee or other person may rely upon any statement of the distributing corporation or association as to any fact, relevant under any provision of this paragraph, concerning the source or character of distributions.

(11) Where the shares of stock of a corporation or association of this state or of any other jurisdiction constitute part of an estate, trust or other fund, and the allocation of any other distribution thereof to principal or income, or between successive interests, depends on the date of accrual thereof, the date of accrual of any distribution on such shares shall be the date specified by the corporation or association declaring such distribution as that on which the shareholders of record entitled to such distribution are to be determined, or, if there be no such date specified by the corporation or association, the date of declaration of the distribution. For the purposes of this paragraph, the "date of accrual" of a distribution means that date, on and after which the distribution shall be treated in the same manner as if it had been declared and paid or distributed on such date.

(12) If a trustee or other person has heretofore received or shall hereafter receive any shares of stock distributed by any corporation or association and is uncertain as to whether any or all of them are allocable to income, the trustee or other person shall have with respect

to all such shares and the proceeds thereof the same duties and powers (including powers of sale, investment and reinvestment) as though all such shares constituted part of the principal of the trust fund. The trustee or other person shall be under no obligation to retain any of such shares in kind even though it may subsequently be determined that some or all of them were allocable to income. If and when it is determined that any or all of such shares were allocable to income, the shares allocable to income shall be distributed in kind to income, except that, if prior to such determination, the trustee or other person had sold any of the new shares comprising the distribution or any of the original shares upon which the distribution was received, income shall be entitled to receive its ratable portion of the shares remaining, if any, on hand and an amount of cash equal to its ratable portion of the proceeds received by the trustee or other person upon the sale of such shares. This subparagraph does not apply in any case in which a trustee or other person has heretofore, in good faith, made any different allocation of the shares or the proceeds of any sale thereof, or both, as between income and principal and has made distribution in accordance with such different allocation to income or to principal, or to both.

(13) Subparagraphs (1) to (6) inclusive and (8) to (11) inclusive apply to any trust, whether created or declared before, on or after the effective date hereof, except that subparagraphs (1) through (11) do not apply to any distribution described in this paragraph which accrued prior to such effective date, and subparagraph (7) applies to trusts created on and after its effective date and to the wills of persons dying on and after its effective date.

(f) Bond premium and discount.

(1) Bonds or other obligations for the payment of money are principal at their inventory value, except as provided in subparagraph (2) for discount bonds. No provision shall be made for amortization of bond premiums or for accumulation of discount, except that in the case of testamentary trusts created by the wills of persons dying, and inter vivos trusts created by instruments executed, prior to September first, nineteen hundred forty-two, premiums may, in the discretion of the trustee, be amortized if the bonds and other obligations for the payment of money were acquired prior to June first, nineteen hundred sixty-five.

The proceeds of a sale, redemption or other disposition of bonds or other obligations are principal.

(2) The increment in value of a bond or other obligation for the payment of money bearing no stated interest but payable or redeemable at maturity or at a future time at an amount in excess of the amount in consideration of which it was issued is income. If the income accrues pursuant to a fixed schedule of appreciation such income is distributable to the beneficiary at the time the increment occurs and the trustee may transfer the amount thereof from principal to income on each such date. Whenever unrealized increment is distributed as income but out of principal the principal shall be reimbursed from the income when realized.

(g) Business operations.

If a trustee uses any part of the principal in the continuance of a business of which the person who created or declared the trust was a sole proprietor or a partner, the net profits of the business, computed in accordance with generally accepted accounting principles for a comparable business, are income. If a loss results in any fiscal or calendar year, the loss falls on principal and shall not be carried into any other fiscal or calendar year for purposes of calculating net income.

(h) Disposition of natural resources.

(1) If any part of the principal consists of a right to receive royalties, overriding or limited royalties, working interests, production payments, net profit interests or other interests in minerals or other natural resources in, on or under land, the receipts from taking the natural resources from the land shall be allocated as follows: (A) if received as rent on a lease or extension payments on a lease the receipts are income; (B) if received from a production payment, the receipts are income to the extent of any factor for interest or its equivalent provided in the governing instrument. There shall be allocated to principal the fraction of the balance of the receipts which the unrecovered cost of the production payment bears to the balance owed on the production payment, exclusive of any factor for interest or its equivalent. The receipts not allocated to principal are income; (C) if received as a royalty, overriding or limited royalty, or

as a bonus, or from a working interest or from any other interest in minerals or other natural resources, receipts not provided for in the preceding subparagraphs shall be apportioned on a yearly basis in accordance with this paragraph whether or not any natural resource was being taken from the land at the time the trust was established. There shall be added to principal as an allowance for depletion such portion of the gross receipts as shall be allowed as a deduction for depletion in computing taxable income for Federal income tax purposes. The balance of the gross receipts, after payment therefrom of all expenses, direct and indirect, is income.

(2) If a trustee, on the effective date of this section, held an item of depletable property of a type specified in this paragraph, he shall allocate receipts from the property in the manner used before the effective date of this section but as to all depletable property thereafter acquired by an existing or new trust, the method of allocation provided herein shall be used.

(i) Sale of timber.

If any part of the principal consists of land from which merchantable timber may be removed, the receipts from taking the timber from the land shall be allocated in accordance with subparagraph (1) (C) of paragraph (a).

(j) Other property subject to depletion.

Except as provided in paragraphs (h) and (i), if any part of the principal consists of property subject to depletion, including leaseholds, patents, copyrights, royalty rights and rights to receive payments on a contract for deferred compensation, the receipts from such property shall be allocated in accordance with subparagraph (1) (C) of paragraph (a).

(k) Underproductive property.

(1) Except as otherwise provided in this paragraph (k), a portion of the net proceeds of a sale by a fiduciary as defined in subparagraph three of paragraph (A) of section 11-1.1 of any principal property of an estate or trust, other than securities listed on a national securities exchange or traded in over the counter, held for more than a year which has not produced over the period held an average net income of one per

cent per annum of its inventory value (including as income the value of any beneficial use of the property by any income beneficiary), shall be allocated to income as delayed income, as provided in this paragraph (k). The net proceeds of such sale shall be the gross proceeds received, including the value of any property other than cash received, less the expenses of sale, including tax, if any, incurred on the gain realized, and less any carrying charges and expenses paid from the estate or trust while such property was held by the fiduciary and was underproductive.

(2) The sum allocated to income as delayed income is the difference between the net proceeds of sale and the amount which, had such amount been invested at simple interest at five per cent per annum while the property was underproductive, would have produced the amount of the net proceeds. Such sum, plus any carrying charges and expenses charged against income while such property was held by such fiduciary and the property was underproductive, less any income actually received from the property during such period and less the value of any beneficial use of the property by any income beneficiary, is income and the balance is principal.

(3) The amount allocated to income as delayed income under this paragraph (k) shall be allocated and paid to the beneficiaries (or their respective estates), if any, who were entitled under the governing instrument to receive income from the estate or trust from time to time during the period the property was held by the fiduciary and was underproductive.

(4) If, or to the extent to which, any principal property subject to this paragraph (k) is sold or disposed of by conversion, and the proceeds of sale or conversion consist of property which cannot be readily apportioned, including, without limitation, land or mortgages (for example, real property acquired by or in lieu of foreclosure), the income beneficiary shall be entitled to the net income from any form of property or obligation received pursuant to such sale or conversion, while the received property or obligation is held, and when such property or obligation is later sold or otherwise disposed of by conversion into easily apportionable property, no allocation to income as provided in this paragraph (k) shall be made.

(5) This paragraph (k) shall not apply if the terms of the governing instrument direct otherwise. A provision in a will or trust instrument

authorizing the fiduciary (A) to retain or to invest in property that is unproductive or underproductive of income (described in the instrument by the words "unproductive" or "underproductive" or words of similar import), or to retain or to invest in property expressly without regard to whether it is productive of income, (B) to transfer any portion of receipts from income to principal on account of depreciation, depletion or amortization, or (C) to accumulate income and add it to principal, shall be deemed to be a direction that this paragraph (k) shall not apply.

(1) Charges against income and principal.

(1) The following charges shall be made against income: (A) ordinary expenses incurred in connection with the administration, management and preservation of the trust property, including regularly recurring taxes assessed against any portion of the principal, water rates, insurance and bond premiums, interest paid by the trustee and ordinary repairs; (B) any tax levied upon receipts defined as income under this section or the trust instrument and payable by the trustee.

(2) If the court shall find that any judicial proceeding primarily concerns income and that it is equitable to charge the expense of such proceeding, or a part thereof, to income, the court may direct that all or a specified part of the expense of such proceeding, including attorneys' fees, shall be charged to income.

(3) If charges against income are of unusual amount, the trustee may by means of reserves or other reasonable means charge them over a reasonable period of time and withhold from distribution sufficient sums to regularize distributions.

(4) The following charges shall be made against principal: (A) charges not provided for in subparagraphs (1) and (2), including court costs and attorneys' fees, the cost of investing and reinvesting principal, payments on principal of an indebtedness (including a mortgage amortized by periodic payments of principal), expenses of preparation of property for sale, and, unless the court directs otherwise, expenses incurred in maintaining or defending any action to protect or construe the trust or the property or assure the title of any trust property; (B) repairs or expenses incurred in making a capital improvement to principal, including special assessments; (C) any tax levied upon profits, gain or other receipts allocated to principal notwithstanding denomination of

the tax as an income tax by the taxing authority.

(5) Regularly recurring charges payable from income shall be apportioned to the same extent and in the same manner that income is apportioned under paragraph (c) hereof.

(6) Notwithstanding the provisions of subparagraphs one and four of this paragraph, fees paid at least annually to banks, trust companies and registered investment advisers for investment advisory and custodial services shall be charged one-third against income and two-thirds against principal.

(m) Application of section.

Except as specifically provided in the trust instrument, the will or in this section, this section shall apply to any receipt or expense received or incurred after its effective date by any trust or decedent's estate whether established before, on or after the effective date of this section and whether the asset involved was acquired by the trustee before, on or after its effective date, provided that this section shall not apply to any receipt or expense received or incurred by any trust or decedent's estate after the effective date of article 11-A.

(n) Uniformity of interpretation.

This section shall be so construed as to effectuate its general purpose to make uniform the law of those states which enact it.

(o) Definitions.

As used in this section:

(1) "Income beneficiary" means any person to whom income is presently payable or for whom it is accumulated for distribution as income.

(2) "Remainderman" means any person entitled to principal, including income which has been accumulated and added to principal.

(3) "Trustee" means an original trustee and any successor or substituted trustee.

(4) "Inventory value" means the cost of property purchased by the trustee and the market value of other property at the time it was made subject to the trust.

## **§ 11-2.2 Power to invest**

### **(a) Investment of trust funds**

(1) A fiduciary holding funds for investment may invest the same in such securities as would be acquired by prudent men of discretion and intelligence in such matters who are seeking a reasonable income and preservation of their capital, provided, however, that nothing in this subparagraph shall limit the effect of any will, agreement, court order or other instrument creating or defining the investment powers of a fiduciary, or shall restrict the authority of a court of proper jurisdiction to instruct the fiduciary in the interpretation or administration of the express terms of any will, agreement or other instrument or in the administration of the property under the fiduciary's care. This paragraph shall apply to any investment, made on or after May first, nineteen hundred seventy, of funds held for investment by a fiduciary, and to all estates and trusts now in existence or which may hereafter come into existence.

A bank, trust company or paid professional investment advisor (whether or not registered under any federal securities or investment law) which serves as a fiduciary, and any other fiduciary representing that it has special investment skills shall exercise such diligence in investing the funds for which the fiduciary is responsible, as would customarily be exercised by prudent men of discretion and intelligence having special investment skills. This paragraph shall apply to any investment, made on or after January first, nineteen hundred eighty-six, of the funds held for investment by such a fiduciary and to all estates and trusts now in existence or which may hereafter come into existence.

This subparagraph shall not apply to any investment, made on or after January first, nineteen hundred ninety-five, of funds held for investment by a fiduciary, and to all estates and trusts in existence or which may come into existence on or after January first, nineteen hundred ninety-five.

(2) A trustee or other person holding trust funds may require such personal bonds or guaranties of payment of principal or interest or both, or such other bonds or guaranties, to accompany investments as may seem prudent, and may from time to time adjust, reduce, modify, postpone

or compound the same, or any terms and conditions thereof, including the rate of interest, or any installments thereof, and may at any time release the same, and all premiums paid on such guaranties or fees for servicing mortgages may be charged to or paid out of income, provided that such charge or payment is not more than at the rate of one-half of one per centum per annum on the par value of such investments. But no trustee shall purchase securities hereunder from himself.

(3) Whenever a trustee or other person holding trust funds has heretofore lawfully invested or shall hereafter lawfully invest any trust funds in a share or part of a bond and mortgage or any part interest therein or shall hold any such share, part or part interest by apportionment, transfer, representation or otherwise, if the property subject to such mortgage is purchased pursuant to foreclosure sale or acquired by voluntary conveyance by or in behalf of such trustee or other person holding trust funds and another person, including another such trustee, owning another such share, part or part interest in such bond and mortgage, such trustee or other person holding trust funds or a person purchasing or acquiring title in behalf of such trustee may convey the undivided interest in such real property so purchased or acquired to a corporation, formed for the purpose of acquiring such property, in exchange for a proportionate part of the capital stock and the bonds, if any, of such corporation; provided that the other person, by or in whose behalf such property has been purchased or acquired, shall exchange his undivided interest in such property for a proportionate part of the capital stock and the bonds, if any, of such corporation, issued in exchange for such real property.

(4) The corporation formed, as provided in subparagraph (3), for the acquisition of such real property shall be a business corporation, and shall have all the powers of such a corporation, and its stockholders shall have the same power to vote to authorize or confirm any sale, mortgage, lease, option or other disposition of any or all of its property that is ordinarily possessed by shareholders of a business corporation; provided, however, that the certificate of incorporation shall prohibit it from investing in any stocks, bonds or other securities, which are not under the laws of this state a proper subject for the investment of trust funds, and shall provide that upon the sale of the real property acquired by the corporation such corporation shall

be dissolved. Such dissolution shall be effectuated by proceedings under article 10 of the business corporation law to be taken promptly after such sale; provided, however, that if any such corporation shall sell real property held by it for a consideration consisting in whole or in part of evidences of indebtedness secured by mortgage upon such real property or shall reacquire such property upon foreclosure of such mortgage, in either of such events, such dissolution proceedings shall not be required to be taken until final liquidation in cash by the corporation of its entire interest in or lien upon such real property.

(5) Nothing contained in this section, however, shall affect any lawful investments in shares, parts or part interests in bonds and mortgages heretofore made by any trustee or other person holding trust funds for investment, nor affect any action heretofore taken in accordance with law with respect to such bonds and mortgages or shares, parts or part interests in such bonds and mortgages. Such trustee or other person holding trust funds for investment shall have all the powers heretofore possessed under this section or any other provision of law with respect to part interests in bonds and mortgages for the protection and preservation of the trust property. It is the intention of this section to prohibit any future investments in part interests in bonds, or notes, and mortgages for any estate or fund, for which such trustee or other person may hold funds for investment.

(6) A fiduciary holding funds for investment who is directed or authorized by an instrument creating the fiduciary relationship to retain the stock of a bank or trust company that is a member of a bank holding company currently fully registered under an act of Congress entitled "Bank Holding Company Act of 1956", as the same may be amended from time to time, shall be considered as being directed or authorized to retain the stock of such bank holding company. Notwithstanding any contrary provision in this section, this subdivision shall apply to any fiduciary relationship now in existence or which may hereafter come into existence and to all investments now held or which may hereafter be acquired in such relationship.

(7) No fiduciary holding funds for investment shall be liable for any loss incurred with respect to any investment not eligible by law for the investment of trust funds, if such ineligible investment was received by such fiduciary pursuant to a decree of court or the terms of the will,

deed, or other instrument creating the fiduciary relationship, or if such ineligible investment was eligible when received or when the investment was made by the fiduciary; provided such fiduciary exercises due care and prudence in the disposition or retention of any such ineligible investment.

(8) Investment by a fiduciary in a limited partnership or investment trust, as defined in 9-1.5 of this chapter, shall not be deemed to be an improper delegation of investment authority.

(9) As used in this paragraph, the phrase "person holding trust funds" and the terms "fiduciary" and "trustee" include a personal representative, trustee, guardian, a donee of a power during minority, committee of the property of an incompetent person, and conservator of the property of a conservatee.

(b) Rights of fiduciaries to invest in securities of investment companies.

(1) A fiduciary holding funds for investment may invest the same in securities of any management type investment company or trust registered pursuant to the federal investment company act of nineteen hundred forty, as amended, in any case in which a court order, the will, agreement or other instrument creating or defining the investment powers of the fiduciary authorizes the investment of such funds in either of the following: (A) Such investments as the fiduciary may, in his discretion, select. (B) Generally in investments other than those in which fiduciaries are by law authorized to invest trust funds, notwithstanding that the fiduciary or an affiliate of the fiduciary acts as investment advisor, custodian, transfer agent, registrar, sponsor, distributor, manager or provides other services to the investment company or trust. Unless the will, lifetime trust or order appointing the fiduciary provides otherwise, the fiduciary shall elect annually either (i) to receive or have its affiliate receive compensation for providing such services to such investment company or trust for the portion of the trust invested in such investment company or trust or (ii) to take annual corporate trustees' commissions with respect to such portion.

This subparagraph shall not apply to any investment, made on or after January first, nineteen hundred ninety-five, of funds held for

investment by a fiduciary, and to all estates and trusts in existence or which may come into existence on or after January first, nineteen hundred ninety-five.

(1-a) In any case in which a court order, will, agreement or other instrument creating or defining the investment powers of the fiduciary directs, requires or authorizes that the funds held for investment be invested in United States government obligations, the fiduciary may invest such funds in securities of, or other interests in, any open-end or closed-end management type investment company or investment trust registered pursuant to the federal investment company act of nineteen hundred forty, as amended, provided that the portfolio of such investment company or investment trust is limited to United States government obligations or to repurchase agreements fully collateralized by such obligations and provided further that such investment company or investment trust shall take delivery of such collateral, either directly or through an authorized custodian.

(2) As used in this paragraph, the term "fiduciary" includes a personal representative, trustee, guardian, committee of the property of an incompetent and conservator of the property of a conservatee.

### **§ 11-2.3 Prudent investor act**

#### **(a) Prudent investor rule.**

A trustee has a duty to invest and manage property held in a fiduciary capacity in accordance with the prudent investor standard defined by this section, except as otherwise provided by the express terms and provisions of a governing instrument within the limitations set forth by section 11-1.7 of this chapter. This section shall apply to any investment made or held on or after January first, nineteen hundred ninety-five by a trustee.

#### **(b) Prudent investor standard.**

(1) The prudent investor rule requires a standard of conduct, not outcome or performance. Compliance with the prudent investor rule is determined in light of facts and circumstances prevailing at the time of the decision or action of a trustee. A trustee is not liable to a beneficiary to the extent that the trustee acted in substantial

compliance with the prudent investor standard or in reasonable reliance on the express terms and provisions of the governing instrument.

(2) A trustee shall exercise reasonable care, skill and caution to make and implement investment and management decisions as a prudent investor would for the entire portfolio, taking into account the purposes and terms and provisions of the governing instrument.

(3) The prudent investor standard requires a trustee:

(A) to pursue an overall investment strategy to enable the trustee to make appropriate present and future distributions to or for the benefit of the beneficiaries under the governing instrument, in accordance with risk and return objectives reasonably suited to the entire portfolio;

(B) to consider, to the extent relevant to the decision or action, the size of the portfolio, the nature and estimated duration of the fiduciary relationship, the liquidity and distribution requirements of the governing instrument, general economic conditions, the possible effect of inflation or deflation, the expected tax consequences of investment decisions or strategies and of distributions of income and principal, the role that each investment or course of action plays within the overall portfolio, the expected total return of the portfolio (including both income and appreciation of capital), and the needs of beneficiaries (to the extent reasonably known to the trustee) for present and future distributions authorized or required by the governing instrument;

(C) to diversify assets unless the trustee reasonably determines that it is in the interests of the beneficiaries not to diversify, taking into account the purposes and terms and provisions of the governing instrument; and

(D) within a reasonable time after the creation of the fiduciary relationship, to determine whether to retain or dispose of initial assets.

(4) The prudent investor standard authorizes a trustee:

(A) to invest in any type of investment consistent with the requirements of this paragraph, since no particular investment is inherently prudent or imprudent for purposes of the prudent investor standard;

(B) to consider related trusts, the income and resources of beneficiaries to the extent reasonably known to the trustee, and also an

asset's special relationship or value to some or all of the beneficiaries if consistent with the trustee's duty of impartiality;

(C) to delegate investment and management functions if consistent with the duty to exercise skill, including special investment skills; and

(D) to incur costs only to the extent they are appropriate and reasonable in relation to the purposes of the governing instrument, the assets held by the trustee and the skills of the trustee.

(5) Trustee's power to adjust.

(A) Where the rules in article 11-A apply to a trust and the terms of the trust describe the amount that may or must be distributed to a beneficiary by referring to the trust's income, the prudent investor standard also authorizes the trustee to adjust between principal and income to the extent the trustee considers advisable to enable the trustee to make appropriate present and future distributions in accordance with clause (b)(3)(A) if the trustee determines, in light of its investment decisions, the consideration factors incorporated in clause (b)(5)(B), and the accounting income expected to be produced by applying the rules in article 11-A, that such an adjustment would be fair and reasonable to all of the beneficiaries.

(B) In deciding whether and to what extent to exercise the power conferred by clause (b)(5)(A), a trustee may consider, in addition to the factors stated in clauses (b)(3)(B) and (b)(4)(B), the following factors to the extent relevant:

(i) the intent of the settlor, as expressed in the governing instrument; the assets held in the trust; the extent to which they consist of financial assets, interests in closely held enterprises, tangible and intangible personal property, or real property; the extent to which an asset is used by a beneficiary; and whether an asset was purchased by the trustee or received from the settlor;

(ii) the net amount allocated to income under article 11-A and the increase or decrease in the value of the principal assets, which the trustee may estimate as to assets for which market values are not readily available; and

(iii) whether and to what extent the terms of the trust give the trustee the power to invade principal or accumulate income or prohibit the trustee from invading principal or accumulating income, and the extent to which the trustee has exercised a power from time to time to

invade principal or accumulate income.

(C) A trustee may not make an adjustment:

(i) with respect to a charitable remainder unitrust described in section 664 of the United States internal revenue code of 1986;

(ii) that changes the amount payable to a beneficiary as a fixed annuity or a fixed fraction of the value of the trust's assets;

(iii) from any amount that is permanently set aside for charitable purposes under a will or the terms of a trust unless the income therefrom is also permanently devoted to charitable purposes;

(iv) if possessing or exercising the power to make an adjustment causes an individual to be treated as the owner of all or part of the trust for income tax purposes, and the individual would not be treated as the owner if the trustee did not possess the power to make an adjustment;

(v) if possessing or exercising the power to make an adjustment causes all or part of the trust assets to be included for estate tax purposes in the estate of an individual who has the power to remove a trustee or appoint a trustee, or both, and the assets would not be included in the estate of the individual if the trustee did not possess the power to make an adjustment;

(vi) if the trustee is a current beneficiary or a presumptive remainderman of the trust;

(vii) if the trustee is not a current beneficiary or a presumptive remainderman, but the adjustment would benefit the trustee directly or indirectly (which, however, shall not include the possible effect on a trustee's commission); or

(viii) if the trust is an irrevocable lifetime trust which provides income to be paid for life to the grantor, and possessing or exercising the power to make an adjustment would cause any public benefit program to consider the adjusted principal or income to be an available resource or available income and the principal or income or both would in each case not be considered as an available resource or income if the trustee did not possess the power to make an adjustment;

(D) An adjustment otherwise prohibited by items (b)(5)(C)(i) through (viii) may be made if the terms of the trust, by express reference to this section, provide otherwise. If item (b)(5)(C) (iv), (v), (vi) or (vii) applies to a trustee and there is more than one trustee, the

trustee or trustees to whom the provision does not apply may make the adjustment unless the exercise of the power by the remaining trustee or trustees is prohibited by the terms of the trust. If there is no trustee qualified to make the adjustment, it may be made if so directed by the court upon application of the trustee or of an interested party.

(E) A trustee may release the entire power conferred by clause (b)(5)(A) or may release only the power to adjust from income to principal or the power to adjust from principal to income if the trustee is uncertain about whether possessing or exercising the power will cause a result described in items (b)(5)(C)(i) through (vi) or (b)(5)(C)(viii) or if the trustee determines that possessing or exercising the power will or may deprive the trust of a tax benefit or impose a tax burden not described in clause (b)(5)(C). The release may be permanent or for a specified period, including a period measured by the life of an individual.

(F) Terms of a trust that limit the power of a trustee to make an adjustment between principal and income are not contrary to this section unless it is clear from the terms of the trust that the terms are intended to deny the trustee the power of adjustment conferred by clause (b)(5)(A).

(G) Any exercise of the power to adjust under this subparagraph, whether from income to principal or from principal to income, shall constitute a re-characterization of the transferred amount from income to principal or from principal to income, as the case may be, for purposes of calculating commissions under article twenty-three of the surrogate's court procedure act and, for such purposes, such re-characterization shall be deemed to take effect on the date that such transfer from income to principal or from principal to income, as the case may be, is made on a trust's records.

(6) Special investment skills.

For a bank, trust company or paid professional investment advisor (whether or not registered under any federal securities or investment law) which serves as a trustee, and any other trustee representing that such trustee has special investment skills, the exercise of skill contemplated by the prudent investor standard shall require the trustee to exercise such diligence in investing and managing assets as would

customarily be exercised by prudent investors of discretion and intelligence having special investment skills.

(c) Delegation of investment or management functions.

(1) Delegation of an investment or management function requires a trustee to exercise care, skill and caution in:

(A) selecting a delegee suitable to exercise the delegated function, taking into account the nature and value of the assets subject to such delegation and the expertise of the delegee;

(B) establishing the scope and terms of the delegation consistent with the purposes of the governing instrument;

(C) periodically reviewing the delegee's exercise of the delegated function and compliance with the scope and terms of the delegation; and

(D) controlling the overall cost by reason of the delegation.

(2) The delegee has a duty to the trustee and to the trust to comply with the scope and terms of the delegation and to exercise the delegated function with reasonable care, skill and caution. An attempted exoneration of the delegee from liability for failure to meet such duty is contrary to public policy and void.

(3) By accepting the delegation of a trustee's function from the trustee of a trust that is subject to the law of New York, the delegee submits to the jurisdiction of the courts of New York even if a delegation agreement provides otherwise, and the delegee may be made a party to any proceeding in such courts that places in issue the decisions or actions of the delegee.

(d) Investment in securities of related investment companies.

A trustee holding funds for investment may invest the same in securities of any management type investment company or trust registered pursuant to the federal investment company act of nineteen hundred forty, as amended, notwithstanding that the trustee or an affiliate of the trustee acts as investment advisor, custodian, transfer agent, registrar, sponsor, distributor, manager or provides other services to the investment company or trust. Unless the will, lifetime trust or order appointing the trustee provides otherwise, the trustee shall elect annually either (i) to receive or have its affiliate receive compensation for providing such services to such investment company or trust for the portion of the trust invested in such investment company

or trust or (ii) to take annual corporate trustees' commissions with respect to such portion.

(e) As used in this section:

(1) the term "trustee" includes a personal representative, trustee, guardian, donee of a power during minority, guardian under article eighty-one of the mental hygiene law, committee of the property of an incompetent person, and conservator of the property of a conservatee, but does not include an institutional fund as defined in section 551 of the not-for-profit corporation law;

(2) the term "trust" includes any fiduciary entity with property owned by a trustee as defined in this section;

(3) the term "governing instrument" includes a court order; and

(4) the term "portfolio" includes all property of every kind and character held by a trustee as defined in this section.

### **§ 11-2.3-A Judicial control with respect to fiduciary's power to adjust**

(a) Judicial control of adjustment power.

A court shall not change a fiduciary's decision to exercise or not to exercise an adjustment power conferred by subparagraph 11-2.3(b)(5) unless it determines that the decision was an abuse of the fiduciary's discretion. A court shall not determine that a fiduciary abused his, her or its discretion merely because the court would have exercised the discretion in a different manner or would not have exercised the discretion.

(b) Applicable decisions.

The decisions to which paragraph (a) applies include:

(1) A determination under subparagraph 11-2.3(b)(5) of whether and to what extent an amount should be transferred from principal to income or from income to principal.

(2) A determination of the factors that are relevant to the trust and its beneficiaries, the extent to which they are relevant, and the weight, if any, to be given to the relevant factors, in deciding whether and to what extent to exercise the power conferred by subparagraph 11-2.3(b)(5).

(c) Authorization for court to remedy abuse of discretion.

If a court determines that a fiduciary has abused his, her or its discretion, the court may restore the income and remainder beneficiaries to the positions they would have occupied if the fiduciary had not abused his, her or its discretion, according to the following rules:

(1) To the extent that the abuse of discretion has resulted in no distribution to a beneficiary or a distribution that is too small, the court shall require the fiduciary to distribute from the trust to the beneficiary an amount that the court determines will restore the beneficiary, in whole or in part, to his or her appropriate position.

(2) To the extent that the abuse of discretion has resulted in a distribution to a beneficiary that is too large, the court shall restore the beneficiaries, the trust, or both, in whole or in part, to their appropriate positions by requiring the fiduciary to withhold an amount from one or more future distributions to the beneficiary who received the distribution that was too large or requiring that beneficiary to return some or all of the distribution to the trust.

(3) To the extent that the court is unable, after applying subparagraphs (1) and (2), to restore the beneficiaries, the trust, or both, to the positions they would have occupied if the fiduciary had not abused his, her or its discretion, and if the court finds that the fiduciary was dishonest or arbitrary and capricious in the exercise of his, her or its discretion, the court may require the fiduciary to pay an appropriate amount from his, her or its own funds to one or more of the beneficiaries or the trust or both.

(d) Petition by fiduciary.

Upon a petition by a fiduciary who is authorized to exercise an adjustment power conferred by subparagraph 11-2.3 (b)(5), the court having jurisdiction over the trust or estate may determine whether a proposed exercise or nonexercise by the fiduciary of the adjustment power will result in an abuse of the fiduciary's discretion. If the petition describes the proposed exercise or nonexercise of the power and contains sufficient information to inform the beneficiaries of the reasons for the proposal, the facts upon which the fiduciary relies, and an explanation of how the income and remainder beneficiaries will be

affected by the proposed exercise or nonexercise of the power, a beneficiary who challenges the proposed exercise or nonexercise has the burden of establishing that it will result in an abuse of discretion.

#### **§ 11-2.4 Optional unitrust provision**

(a) Unless the terms of the trust provide otherwise, the net income of any trust to which this section applies shall mean the unitrust amount as determined hereunder.

(b) Unitrust amount.

(1) For the first year of the trust as a unitrust, including a short year if applicable, the "unitrust amount" for the year shall mean an amount equal to four percent of the net fair market values of the assets held in the trust at the beginning of the first business day of the current valuation year.

(2) For the second year of a trust as a unitrust, including a first short year if applicable, the "unitrust amount" for the year shall mean an amount equal to four percent multiplied by a fraction, the numerator of which shall be the sum of (A) the net fair market values of the assets held in the trust at the beginning of the first business day of the current valuation year and (B) the net fair market values of the assets held in the trust at the beginning of the first business day of the prior valuation year, and the denominator of which shall be two.

(3) Commencing with the third year of a trust as a unitrust, including a first short year if applicable, the "unitrust amount" for a current valuation year of the trust shall mean an amount equal to four percent multiplied by a fraction, the numerator of which shall be the sum of (A) the net fair market values of the assets held in the trust at the beginning of the first business day of the current valuation year and (B) the net fair market values of the assets held in the trust at the beginning of the first business day of each prior valuation year, and the denominator of which shall be three.

(4) The unitrust amount for the current valuation year as computed in accordance with subparagraph (b)(1), (2) or (3), as adjusted in accordance with this subparagraph, shall be proportionately reduced for any corpus distributions to beneficiaries mandated by the terms of the trust, in whole or in part (other than distributions of the unitrust

amount), and shall be proportionately increased for the receipt, other than a receipt that represents a return on investment, of any additional corpus into the trust within a current valuation year.

(5) For purposes of clause (b)(2)(B), the net fair market values of the assets held in the trust at the beginning of the first business day of a prior valuation year shall be adjusted to reflect any distributions to beneficiaries mandated by the terms of the trust, in whole or in part (other than distributions of the unitrust amount), or receipts (other than receipts that represent a return on investment) of any additional principal into the trust, which have occurred after the first day of such prior valuation year and by the close of the first day of the current valuation year, as if the distribution or receipt had occurred on the first day of such prior valuation year.

(6) In the case of a short year, the trustee shall prorate the unitrust amount on a daily basis. The trustee shall prorate any adjustment under subparagraph (b)(4) on a daily basis.

(7) In the case where the unitrust amount has been incorrectly determined either in a current valuation year or in a prior valuation year, then within a reasonable time (not to exceed eighteen months) after the error was made, the trustee shall make any non-material adjustments and pay to the underpaid beneficiary (in case of non-material underpayment) or shall recover from the overpaid beneficiary (in case of non-material overpayment) an amount equal to the difference between the unitrust amount properly payable and any amount actually paid for any completed valuation year of the trust and shall properly adjust the unitrust amount for the current valuation year if affected non-materially by prior incorrect determination of a unitrust amount. A material correction shall require approval of the surrogate if applied for by the trustee or an interested party.

(c) Other definitions and special rules. For purposes of this section:

(1) A "current beneficiary" is a person to whom the income (within the meaning of this section or otherwise) of the trust is payable, or in the discretion of the trustee may be paid, in whole or in part, during the current valuation year.

(2) The term "current valuation year" shall mean the year of the trust for which the unitrust amount is being determined.

(3) The term "prior valuation year" shall mean each of the two years

of the trust immediately preceding the current valuation year.

(4) The term "year" means a calendar year. A "short year" constitutes a portion of a calendar year that begins when the interest of the current beneficiary or class of current beneficiaries begins or ends when the interest of the current beneficiary or class of current beneficiaries ends.

(5) "Net fair market value" shall mean the fair market value of each asset comprising the trust reduced by the fair market value of any outstanding interest-bearing obligations of the trust, whether allocable to a specific asset or otherwise. Fair market value of an asset may be determined by any appropriate technique adopted and consistently applied by the trustee, and such techniques may include, but are not limited to, use of the asset's value at the close of business on the previous business day, and notwithstanding that such day may be in a prior year or be a day on which the trust was not subject to this section.

(6) In determining the sum of the net fair market values of the assets held in the trust for purposes of subparagraphs (b)(1), (2) and (3), and in determining whether an adjustment is required in accordance with subparagraph (b)(4) or (5), there shall not be taken into account the value:

(A) of any residential property or any tangible personal property that, as of the beginning of the first business day of the current valuation year, one or more current beneficiaries of the trust have or had the right to occupy, or have or had the right to possess or control (other than in his or her capacity as a trustee of the trust), and instead the right of occupancy or the right to possession or control shall be deemed to be the unitrust amount with respect to such residential property or such tangible personal property; provided, however, that the unitrust amount shall be adjusted in accordance with subparagraphs (b) (4) and (5) for partial distributions from or receipt into the trust of such residential property or tangible personal property during the current valuation year.

(B) of any asset specifically given to a beneficiary and the return on investment on such property, which return on investment shall be distributable to such beneficiary.

(C) of any assets while held in a testator's estate.

(D) of (i) amounts paid or distributed to the trust by a decedent's

estate, another trust or another payor, as income pursuant to article 11-A attributable to an asset or amount due to the trust for a period prior to its payment or distribution to the trust, unless and except to the extent that the unitrust trustee, having the power to accumulate income, shall have determined to accumulate and add such income to principal, and such unaccumulated net income shall be distributable to the beneficiaries of the trust; or (ii) any amount paid or distributed by such decedent's estate, other trust or other payor, directly to beneficiaries of the trust in satisfaction of their ultimate entitlement to such income.

(7) In determining the net fair market value of each asset held in the trust pursuant to subparagraphs (b)(1), (2) and (3), the trustee shall, not less often than annually, determine the fair market value of each asset of the trust that consists primarily of real property or other property that is not traded on a regular basis in an active market, and all such determinations shall, if made reasonably and in good faith, be conclusive on all persons interested in the trust. Such determination shall be conclusively presumed to have been made reasonably and in good faith unless proven otherwise in a proceeding commenced by or on behalf of a person interested in the trust within three years after the close of the year in which the determination is made.

(8) The term "trustee" does not include a personal representative.

(9) The term "trust" does not include an estate.

(d) Commencement of current beneficiary's interest.

(1) The interest of a current beneficiary or class of current beneficiaries in the unitrust amount begins on the date on which this section becomes applicable to the trust pursuant to clause (e)(4)(A), or if later the date assets first become subject to the trust. An asset becomes subject to a trust:

(A) on the date it is transferred to the trust in the case of an asset that is transferred to a trust during the transferor's life;

(B) on the date it is transferred to the trust in the case of an asset that is transferred to a testamentary trust created under a will;

(C) on the date of an individual's death in the case of an asset that is transferred to a trust by a third party by reason of the individual's death;

(D) on the date of an individual's death in the case of a trust that

owns life insurance on the individual's life; or

(E) on the date a revocable trust becomes irrevocable in the case of assets then held in the trust.

(2) A trust which continues in existence for the benefit of one or more new current beneficiaries or class of current beneficiaries upon the termination of the interests of all prior current beneficiaries or classes of prior current beneficiaries, shall be deemed to be a new trust, and, for purposes of clauses (e)(1)(B) and (e)(4)(A) and subparagraph (d)(1), assets shall be deemed to first become subject to the trust on the date of the termination of such interests.

(e) Trusts to which section applies.

(1) This section shall apply to any trust if:

(A) the governing instrument provides that this section shall apply to such trust, or

(B) (i) with respect to a trust in existence prior to January first, two thousand two, on or before December thirty-first, two thousand five, the trustee, with the consent by or on behalf of all persons interested in the trust or in his, her or its discretion, elects to have this section apply to such trust, or

(ii) with respect to a trust not in existence prior to January first, two thousand two, on or before the last day of the second full year of the trust beginning after assets first become subject to the trust, the trustee, with the consent by or on behalf of all persons interested in the trust or in his, her or its discretion, elects to have this section apply to such trust.

(iii) An election in accordance with this subparagraph shall be made by an instrument, executed and acknowledged, and delivered to the creator of the trust, if he or she is then living, to all persons interested in the trust or to their representatives and to the court, if any, having jurisdiction over the trust.

(2) (A) The court having jurisdiction of a trust to which this section otherwise would apply by reason of subparagraph (e)(1) or clause (e)(2)(B), upon the petition of the trustee or any beneficiary of the trust and upon notice to all persons interested in the trust, may direct that article 11-A shall apply to the trust and that this section shall not apply to the trust; and

(B) At any time, the court having jurisdiction of a trust to which

this section otherwise would not apply, upon the petition of the trustee or any beneficiary of the trust and upon notice to all persons interested in the trust, may direct that this section shall apply to the trust and that article 11-A shall not apply to the trust.

(3) For the purposes of this section, the phrase "all persons interested in the trust" shall mean all the persons upon whom service of process would be required in a proceeding for the judicial settlement of the account of the trustee, taking into account section three hundred fifteen of the surrogate's court procedure act. Where a person interested in the trust has the same interest as a person under a disability, it shall not be necessary to obtain the consent of or notify the person under a disability.

(4) (A) This section shall apply to a trust with respect to which there is:

(i) a direction in the governing instrument in accordance with clause (e)(1)(A), as of the date provided for in such governing instrument, or if there is no provision then as of the day on which assets first become subject to the trust;

(ii) an election in accordance with clause (e)(1)(B), as of the date specified in the election, which may be any day within the year in which the election is made or the first day of the year commencing after the election is made; or a

(iii) court decision rendered in accordance with clause (e)(2)(B) as of the date specified by the court in its decision;

Provided, however, that if later than any date set by this clause, this section shall not apply to the trust until January first, two thousand two.

(B) If this section applied to a trust with respect to which a court decision is rendered in accordance with clause (e)(2)(A), this section shall cease to apply to such trust and article 11-A shall apply to the trust as of the first day of the year beginning after the decision of the court becomes final, unless the court in its decision provides otherwise.

(5) In the determination of whether article 11-A or this section should apply to a trust:

(A) All of the factors relevant to the trust and its beneficiaries,

including the following factors to the extent they are relevant, shall be considered:

- (i) the nature, purpose, and expected duration of the trust;
- (ii) the intent of the creator of the trust;
- (iii) the identity and circumstances of the beneficiaries;
- (iv) the needs for liquidity, regularity of payment, and preservation and appreciation of capital;
- (v) the assets held in the trust; the extent to which they consist of financial assets, interests in closely held enterprises, tangible and intangible personal property, or real property; the extent to which an asset is used by a beneficiary; and whether an asset was purchased by the trustee or received from the creator of the trust.

(B) In any proceeding brought pursuant to subparagraph (e)(2), there shall be a rebuttable presumption that this section should apply to the trust.

(f) Trusts to which this section shall not apply. This section shall not apply to a trust if:

(1) the governing instrument provides in substance that this section shall not apply;

(2) the trust is a pooled income fund described in section 642(c)(5) of the United States internal revenue code of 1986;

(3) the trust is a charitable remainder annuity trust or a charitable remainder unitrust described in section 664 of the United States internal revenue code of 1986; or

(4) the trust is an irrevocable lifetime trust which provides for income to be paid for the life of a grantor, and possessing or exercising the power to make this section apply would cause any public benefit program to consider additional amounts of principal or income to be an available resource or available income, and the principal or income or both would in each case not be considered an available resource or income, if there was no power to make this section apply, if, based upon the facts and circumstances surrounding the formation of such trust, it can reasonably be concluded that the primary purpose for the establishment of the trust was to ensure that the trust principal would not be treated as an available resource for the purposes of a governmental assistance program.

### **PART 3. ACTIONS BY OR AGAINST PERSONAL REPRESENTATIVES**

#### **§ 11-3.1 Actions**

Any action, other than an action for injury to person or property, may be maintained by and against a personal representative in all cases and in such manner as such action might have been maintained by or against his decedent.

#### **§ 11-3.2 Action for injury to person or property survives despite death of person in whose favor or against whom cause of action existed**

(a) Action against personal representative for injury to person or property.

(1) No cause of action for injury to person or property is lost because of the death of the person liable for the injury. For any injury, an action may be brought or continued against the personal representative of the decedent, but punitive damages shall not be awarded nor penalties adjudged in any such action brought to recover damages for personal injury. This section extends to a cause of action for wrongfully causing death and an action therefor may be brought or continued against the personal representative of the person liable therefor.

(2) Where death or an injury to person or property, resulting from a wrongful act, neglect or default, occurs simultaneously with or after the death of a person who would have been liable therefor if his death had not occurred simultaneously with such death or injury or between the wrongful act, neglect or default and the resulting death or injury, an action to recover damages for such death or injury may be maintained against the personal representative of such person.

(b) Action by personal representative for injury to person or property.

No cause of action for injury to person or property is lost because of

the death of the person in whose favor the cause of action existed. For any injury an action may be brought or continued by the personal representative of the decedent, but punitive damages shall not be awarded nor penalties adjudged in any such action brought to recover damages for personal injury where the death occurs on or before August thirty-first, nineteen hundred eighty-two. On the trial of any such action accruing before September first, nineteen hundred seventy-five, which is joined with an action for causing death, the contributory negligence of the decedent is a defense, to be pleaded and proved by the defendant. No cause of action for damages caused by an injury to a third person is lost because of the death of the third person.

### **§ 11-3.3 Limitations upon recovery where injury causes death**

(a) Where an injury causes the death of a person the damages recoverable for such injury are limited to those accruing before death and shall not include damages for or by reason of death, except that the reasonable funeral expenses of the decedent, paid by the estate or for the payment of which the estate is responsible, shall be recoverable in such action. The damages recovered become part of the estate of the deceased.

(b) Nothing contained herein shall affect the cause of action existing in favor of the next of kin under 5-4.1, subject to the following:

(1) Such cause of action and the cause of action, under this section, in favor of the estate to recover damages may be prosecuted to judgment in a single action; a separate verdict, report or decision shall be rendered as to each cause of action.

(2) Where an action to recover damages for personal injury has been brought, and the injured person dies, as a result of the injury, before verdict, report or decision, his personal representative may enlarge the complaint in such action to include the cause of action for wrongful death under 5-4.1.

(3) Where an action to recover damages under this section and a separate action for wrongful death under 5-4.1 are pending against the same defendant, they may be consolidated on the motion of either party.

### **§ 11-3.4 Action by representative of representative**

Except as otherwise prescribed by law, a personal representative of a personal representative has no authority to commence or maintain any action or proceeding relating to the estate, effects or rights of the decedent of the first representative, or to take any charge or control thereof, as such representative.

## **PART 4. PROCEDURAL ASPECTS OF ACTIONS BY OR AGAINST PERSONAL REPRESENTATIVES**

### **§ 11-4.1 How to sue or be sued**

Actions or proceedings brought by or against a personal representative must be brought by or against him in his representative capacity.

### **§ 11-4.2 When personal and representative causes of action may be joined**

Actions or proceedings brought against a personal representative personally and in his representative capacity may be joined. In such case a judgment for the plaintiff must clearly indicate whether it is awarded against the defendant personally or in his representative capacity.

### **§ 11-4.3 Separate dockets and executions**

In a case specified in 11-4.2 or where costs to be collected out of the individual property of a personal representative are awarded in an action or proceeding by or against him in his representative capacity, so much of the judgment as awards a sum of money against him personally may be separately docketed and a separate execution may be issued thereupon, as if the judgment contained no award against him in his representative capacity.

**§ 11-4.4 Commencement of action against personal representatives; rule when some of representatives not served**

Where an action or proceeding is commenced against two or more personal representatives in their representative capacities, jurisdiction of all is obtained by service of process upon any one of them and any judgment recovered may be entered and execution issued thereon against all of them, in their representative capacities, as if all had been served.

**§ 11-4.5 Want of assets not to be pleaded by personal representative**

In an action or proceeding against a personal representative, in his representative capacity, in which the complaint demands judgment for a sum of money, the non-existence or insufficiency of assets may not be pleaded and the plaintiff's right of recovery is not affected thereby.

**§ 11-4.6 Leave to issue execution against personal representative; how procured; order and contents thereof; security before order granted; execution on judgment recovered by predecessor representative**

(a) Leave to issue execution against personal representative.

Except as provided in this paragraph, an execution shall not be issued upon a judgment for a sum of money against a personal representative, in his representative capacity, until an order permitting it to be issued has been made by the surrogate's court from which letters were issued. Such an order must specify the sum to be collected, and the execution must be endorsed with a direction to collect that sum. If a judgment is rendered jointly against a personal representative in his representative capacity and one or more other parties, execution may be issued thereon, without such order, against the other party if a direction is endorsed thereon not to levy against any property which the personal

representative is or may be entitled to possess in his representative capacity.

(b) How leave procured; order; contents thereof.

At least six days notice of the application for an order specified in paragraph (a) must be personally served upon the personal representative, unless it appears that service cannot be so made with due diligence, in which case notice must be given to such persons and in such manner as the surrogate directs by an order to show cause why the application should not be granted. Where it appears that the assets, after payment of all sums chargeable against them for expenses and for claims entitled to priority as against the plaintiff, are not, or will not be sufficient to pay all the debts, testamentary dispositions or other claims of the class to which the plaintiff's claim belongs, the sum directed to be collected by the execution shall not exceed the plaintiff's just proportion of the assets. In that case, one or more orders may be subsequently made in like manner, and one or more executions may be subsequently issued, whenever it appears that the sum directed to be collected by the first and subsequent execution is less than the plaintiff's just proportion.

(c) Security before grant of order.

Where a judgment has been rendered against a personal representative in his representative capacity for a testamentary disposition or distributive share, the surrogate, before granting an order permitting an execution to be issued thereupon, may, and in a proper case must, require the applicant to file in his office a bond to the defendant, in such a sum and with such sureties as the surrogate directs, to the effect that if, after collection of any sum of money by virtue of the execution, the remaining assets are not sufficient to pay all sums for which the defendant is chargeable for expenses, claims entitled to priority as against the applicant, and the other testamentary dispositions or distributive shares of the class to which the applicant's claim belongs, the plaintiff will refund to the defendant the sum so collected, or such ratable part thereof as is necessary to make up the deficiency.

(d) Execution on former judgment.

An execution may be issued in the name of a personal representative, in his representative capacity, upon a judgment recovered by any person who preceded him in the administration of the same estate, in any case where it might have been issued in favor of the original plaintiff, and without a substitution.

**§ 11-4.7 Liability of the personal representative for claims arising out of the administration of the estate**

(a) Unless otherwise provided in the contract, a personal representative is not individually liable on a contract properly entered into in his fiduciary capacity in the course of administration of the estate unless he fails to reveal his representative capacity and identify the estate or trust in the contract.

(b) A personal representative is individually liable for obligations arising from ownership or control of the estate or for torts committed in the course of administration of the estate only if he failed to exercise reasonable care, diligence and prudence.

(c) Claims based on contracts entered into by a personal representative in his fiduciary capacity, on obligations arising from ownership or control of the estate or on torts committed in the course of estate administration may be asserted against the estate by proceeding against the personal representative in his fiduciary capacity, whether or not the personal representative is individually liable therefor.

(d) In any case where liability is found against the estate as the result of an action or proceeding brought under subdivision (c), issues of liability as between the estate and the personal representative shall be determined in an accounting proceeding brought pursuant to section twenty-two hundred five of the surrogate's court procedure act.

(e)(1) For the purposes of this paragraph: (i) the term "act" shall mean the federal air transportation safety and system stabilization act, public law 107-42, as amended; (ii) the term "fund" shall mean the September eleventh victim compensation fund of two thousand one established pursuant to title IV of the act; and (iii) the term "personal representative" shall have the same meaning as that term has

pursuant to section 104.4 of title twenty-eight of the code of federal regulations.

(2) Notwithstanding any other provision of law to the contrary, any person who serves as the personal representative of a victim of the terrorist attacks on September eleventh, two thousand one, and who files a claim with the fund, shall have no liability to any person resulting from any actions taken reasonably and in good faith under the act, including but not limited to: (i) the submission or prosecution of a claim to the fund; (ii) a decision not to submit such a claim, or to withdraw a claim previously submitted; (iii) the waiver pursuant to the act of the right to file a civil action (or to be a party to an action) in any federal or state court for damages sustained as a result of the terrorist attacks; (iv) the failure to identify or locate any person designated for receipt of notice under subdivision (b) of section 104.4 of title twenty-eight of the code of federal regulations, provided that the personal representative made a reasonable and good faith effort to identify and locate such person; or (v) the payment or distribution of any award received from the fund in accordance with any plan of distribution that has been submitted to and approved by the special master appointed under the act.

(3) Notwithstanding any other provision of law to the contrary, or any restrictions set forth in letters relating to any decedent who is a victim of the terrorist attacks on September eleventh, two thousand one, a duly appointed personal representative is authorized to file and prosecute a claim with the fund, and the filing of such a claim for an award from the fund, and the resulting compromise of any cause of action pursuant to the act, shall not violate any restriction on the powers granted to the personal representative relating to the prosecution or compromise of any action, the collection of any settlement, or the enforcement of any judgment.

## ARTICLE 11-A

### UNIFORM PRINCIPAL AND INCOME ACT

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## PART 1. DEFINITIONS AND FIDUCIARY DUTIES

### § 11-A-1.1 Short title

This article may be cited as the New York uniform principal and income act.

### § 11-A-1.2 Definitions

In this article:

(1) "Accounting period" means a calendar year unless another twelve-month period is selected by a fiduciary. The term includes a portion of a calendar year or other twelve-month period that begins when an income interest begins or ends when an income interest ends.

(2) "Beneficiary" includes, in the case of a decedent's estate, a distributee and testamentary beneficiary and, in the case of a trust, an income beneficiary and a remainder beneficiary.

(3) "Fiduciary" means a personal representative or trustee. The term includes an executor, administrator, successor personal representative, and a person performing substantially the same function.

(4) "Income" means money or property that a fiduciary receives as current return from a principal asset. The term includes a portion of receipts from a sale, exchange, or liquidation of a principal asset, to the extent provided in part 4.

(5) "Income beneficiary" means a person to whom net income of a trust is or may be payable.

(6) "Income interest" means the right of an income beneficiary to receive all or part of net income, whether the terms of the trust

require it to be distributed or authorize it to be distributed in the trustee's discretion.

(7) "Mandatory income interest" means the right of an income beneficiary to receive net income that the terms of the trust require the fiduciary to distribute.

(8) "Net income" means the total receipts allocated to income during an accounting period minus the disbursements made from income during the period, plus or minus transfers under this article or under subparagraph 11-2.3(b)(5) to or from income during the period.

(9) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government; governmental subdivision, agency, or instrumentality; public corporation, or any other legal or commercial entity.

(10) "Principal" means property held in trust for distribution to a remainder beneficiary when the trust terminates.

(11) "Remainder beneficiary" means a person entitled to receive principal when an income interest ends.

(12) "Terms of a trust" means the manifestation of the intent of a settlor or decedent with respect to the trust, expressed in a manner that admits of its proof in a judicial proceeding, whether by written or spoken words or by conduct.

(13) "Trustee" includes an original, additional, or successor trustee, whether or not appointed or confirmed by a court.

### **§ 11-A-1.3 Fiduciary duties; general principles**

(a) In allocating receipts and disbursements to or between principal and income, and with respect to any matter within the scope of parts 2 and 3, a fiduciary:

(1) shall administer a trust or estate in accordance with the terms of the trust or the will, even if there is a different provision in this article;

(2) may administer a trust or estate by the exercise of a discretionary power of administration given to the fiduciary by the terms of the trust or the will, even if the exercise of the power produces a result different from a result required or permitted by this

article;

(3) shall administer a trust or estate in accordance with this article if the terms of the trust or the will do not contain a different provision or do not give the fiduciary a discretionary power of administration; and

(4) shall add a receipt or charge a disbursement to principal to the extent that the terms of the trust or the will and this article do not provide a rule for allocating the receipt or disbursement to or between principal and income.

(b) In exercising a discretionary power of administration regarding a matter within the scope of this article, whether granted by the terms of a trust, a will, or this article, a fiduciary shall administer a trust or estate impartially, based on what is fair and reasonable to all of the beneficiaries, except to the extent that the terms of the trust or the will clearly manifest an intention that the fiduciary shall or may favor one or more of the beneficiaries. A determination in accordance with this article is presumed to be fair and reasonable to all of the beneficiaries.

## **PART 2. DECEDENT'S ESTATE OR TERMINATING INCOME INTEREST**

### **§ 11-A-2.1 Determination and distribution of net income**

After a decedent dies, in the case of an estate, or after an income interest in a trust ends, the following rules apply:

(1) A fiduciary of an estate or of a terminating income interest shall determine the amount of net income and net principal receipts received from property specifically given to a beneficiary under the rules in parts 3 through 5 which apply to trustees and the rules in paragraph (5). The fiduciary shall distribute the net income and net principal receipts to the beneficiary who is to receive the specific property.

(2) A fiduciary shall determine the remaining net income of a decedent's estate or a terminating income interest under the rules in parts 3 through 5 which apply to trustees and by:

(A) including in net income all income from property used to discharge

liabilities;

(B) paying from income or principal, in the fiduciary's discretion, fees of attorneys, accountants, and fiduciaries; court costs and other expenses of administration; and interest on death taxes, but the fiduciary may pay those expenses from income of property passing to a trust for which the fiduciary claims an estate tax marital or charitable deduction only to the extent that the payment of those expenses from income will not cause the reduction or loss of the deduction; and

(C) paying from principal all other disbursements made or incurred in connection with the settlement of a decedent's estate or the winding up of a terminating income interest, including debts, funeral expenses, disposition of remains, family allowances, and death taxes and related penalties that are apportioned to the estate or terminating income interest by the will, the terms of the trust, or applicable law.

(3) Unless otherwise provided by the terms of the will or trust, commencing (A) seven months from either the date of death or other date a beneficiary is to receive a pecuniary amount outright if letters are not required, unless the beneficiary is a genetic child, then such date shall be the later of the aforementioned time periods in this subparagraph or the date of birth of the genetic child entitled to inherit from the child's genetic parent under section 4-1.3 of this chapter, or (B) seven months from the time letters, including preliminary or temporary letters, are granted if letters are required, unless the beneficiary is a genetic child, then such date shall be the later of the aforementioned time period in this subparagraph or the date of birth of the genetic child entitled to inherit from the child's genetic parent under section 4-1.3 of this chapter, a fiduciary shall distribute income to a beneficiary who receives a pecuniary amount outright, from net income determined under paragraph (2) or from principal to the extent that net income is insufficient, of an amount equal to the pecuniary amount multiplied by an income factor, which shall be set (or reset) on the first business day of each calendar year and fixed for that calendar year at the target Federal funds rate as announced by the Federal Reserve Board (or in the event the target Federal funds rate is a range of rates, the high of that range) less one percent, but in no event less than one-half of one percent.

(4) A fiduciary shall distribute the net income remaining after

distributions required by paragraph (3) in the manner described in 11-A-2.2 to all other beneficiaries, including a beneficiary who receives a pecuniary amount in trust, even if the beneficiary holds an unqualified power to withdraw assets from the trust or other presently exercisable general power of appointment over the trust.

(5) A fiduciary may not reduce principal or income receipts from property described in paragraph (1) because of a payment described in 11-A-5.1 or 11-A-5.2 to the extent that the will, the terms of the trust, or applicable law requires the fiduciary to make the payment from assets other than the property or to the extent that the fiduciary recovers or expects to recover the payment from a third party. The net income and principal receipts from the property are determined by including all of the amounts the fiduciary receives or pays with respect to the property, whether those amounts accrued or became due before, on, or after the date of a decedent's death or an income interest's terminating event, and by making a reasonable provision for amounts that the fiduciary believes the estate or terminating income interest may become obligated to pay after the property is distributed.

#### **§ 11-A-2.2 Distribution to residuary and remainder beneficiaries**

(a) Each beneficiary described in paragraph 11-A-2.1 (4) is entitled to receive a portion of the net income equal to the beneficiary's fractional interest in undistributed principal assets, using values as of the distribution date, provided, however, that any amount allowed as a tax deduction to the estate for income payable to a charitable organization shall be paid, without diminution for taxes, to the charitable organization entitled to receive such income. If a fiduciary makes more than one distribution of assets to beneficiaries to whom this section applies, each beneficiary, including one who does not receive part of the distribution, is entitled, as of each distribution date, to the net income the fiduciary has received after the date of death or terminating event or earlier distribution date but has not distributed as of the current distribution date.

(b) In determining a beneficiary's share of net income, the following rules apply:

(1) The beneficiary is entitled to receive a portion of the net income

equal to the beneficiary's fractional interest in the undistributed principal assets immediately before the distribution date, including assets that later may be sold to meet principal obligations.

(2) The beneficiary's fractional interest in the undistributed principal assets must be calculated without regard to property specifically given to a beneficiary and property required to pay pecuniary amounts not in trust.

(3) The beneficiary's fractional interest in the undistributed principal assets must be calculated on the basis of the aggregate value of those assets as of the distribution date without reducing the value by any unpaid principal obligation.

(4) The distribution date for purposes of this section may be the date as of which the fiduciary calculates the value of the assets if that date is reasonably near the date on which assets are actually distributed.

(c) If a fiduciary does not distribute all of the collected but undistributed net income to each person as of a distribution date, the fiduciary shall maintain appropriate records showing the interest of each beneficiary in that net income.

(d) A fiduciary may apply the rules in this section, to the extent that the fiduciary considers it appropriate, to net gain or loss realized after the date of death or terminating event or earlier distribution date from the disposition of a principal asset if this section applies to the income from the asset.

(e) The portion of a beneficiary determined under paragraph (a) is subject to the fiduciary's further power of adjustment under subparagraph 11-2.3(b)(5), which adjustment if made shall be made to or from the principal of such beneficiary's share. The fiduciary shall maintain appropriate records showing the principal interest of each beneficiary, as adjusted.

### **PART 3. APPORTIONMENT AT BEGINNING AND END OF INCOME INTEREST**

#### **§ 11-A-3.1 When right to income begins and ends**

(a) An income beneficiary is entitled to net income from the date on

which the income interest begins. An income interest begins on the date specified in the terms of the trust or, if no date is specified, on the date an asset becomes subject to a trust or successive income interest.

(b) An asset becomes subject to a trust:

(1) on the date it is transferred to the trust in the case of an asset that is transferred to a trust during the transferor's life;

(2) on the date of a testator's death in the case of an asset that becomes subject to a trust by reason of a will, even if there is an intervening period of administration of the testator's estate; or

(3) on the date of an individual's death in the case of an asset that is transferred to a fiduciary by a third party because of the individual's death.

(c) An asset becomes subject to a successive income interest on the day after the preceding income interest ends, as determined under paragraph (d), even if there is an intervening period of administration to wind up the preceding income interest.

(d) An income interest ends on the day before an income beneficiary dies or another terminating event occurs, or on the last day of a period during which there is no beneficiary to whom a trustee may distribute income.

### **§ 11-A-3.2 Apportionment of receipts and disbursements when decedent dies or income interest begins**

(a) A trustee shall allocate an income receipt or disbursement other than one to which paragraph 11-A-2.1 (1) applies to principal if its due date occurs before a decedent dies in the case of an estate or before an income interest begins in the case of a trust or successive income interest.

(b) A trustee shall allocate an income receipt or disbursement to income if its due date occurs on or after the date on which a decedent dies or an income interest begins and it is a periodic due date. An income receipt or disbursement must be treated as accruing from day to day if its due date is not periodic or it has no due date. The portion of the receipt or disbursement accruing before the date on which a decedent dies or an income interest begins must be allocated to principal and the balance must be allocated to income.

(c) An item of income or an obligation is due on the date the payer is required to make a payment. If a payment date is not stated, there is no due date for the purposes of this article. Distributions to shareholders or other owners from an entity to which 11-A-4.1 applies are deemed to be due on the date fixed by the entity for determining who is entitled to receive the distribution or, if no date is fixed, on the declaration date for the distribution. A due date is periodic for receipts or disbursements that must be paid at regular intervals under a lease or an obligation to pay interest or if an entity customarily makes distributions at regular intervals.

### **§ 11-A-3.3 Apportionment when income interest ends**

(a) In this section, "undistributed income" means net income received on or before the date on which an income interest ends. The term does not include an item of income or expense that is due or accrued or net income that has been added or is required to be added to principal under the terms of the trust.

(b) When a mandatory income interest ends, the trustee shall pay to a mandatory income beneficiary who survives that date, or the estate of a deceased mandatory income beneficiary whose death causes the interest to end, the beneficiary's share of the undistributed income that is not disposed of under the terms of the trust unless the beneficiary has an unqualified power to revoke more than five percent of the trust immediately before the income interest ends. In the latter case, the undistributed income from the portion of the trust that may be revoked must be added to principal.

(c) When a trustee's obligation to pay a fixed annuity or a fixed fraction of the value of the trust's assets ends, the trustee shall prorate the final payment if and to the extent required by applicable law to accomplish a purpose of the trust or its settlor relating to income, gift, estate, or other tax requirements.

## **PART 4. ALLOCATION OF RECEIPTS DURING ADMINISTRATION OF TRUST**

## **SUBPART 1. RECEIPTS FROM ENTITIES**

### **§ 11-A-4.1 Character of receipts**

(a) In this section, "entity" means a corporation, partnership, limited liability company, regulated investment company, real estate investment trust, common trust fund, or any other organization in which a trustee has an interest other than a trust or estate to which 11-A-4.2 applies, a business or activity to which 11-A-4.3 applies, or an asset-backed security to which 11-A-4.15 applies.

(b) Except as otherwise provided in this section, a trustee shall allocate to income money received from an entity.

(c) A trustee shall allocate the following receipts from an entity to principal:

(1) property other than money; provided that if a trustee receives the option to receive a distribution in the form of money or property and elects to receive the distribution in the form of property such distribution shall be considered to be a distribution of money;

(2) money received in one distribution or a series of related distributions in exchange for part or all of a trust's interest in the entity;

(3) money received in total or partial liquidation of the entity; and

(4) money received from an entity that is a regulated investment company or a real estate investment trust if the money distributed is a capital gain dividend for federal income tax purposes.

(d) Money is received in partial liquidation:

(1) to the extent that the entity, at or near the time of a distribution, indicates that it is a distribution in partial liquidation; or

(2) if the total amount of money and property received in a distribution or series of related distributions is greater than twenty percent of the entity's gross assets, as shown by the entity's year-end financial statements immediately preceding the initial receipt.

(e) Money is not received in partial liquidation, nor may it be taken into account under subparagraph (d)(2), to the extent that it does not exceed the amount of income tax that a trustee or beneficiary must pay on taxable income of the entity that distributes the money.

(f) A trustee may rely upon a statement made by an entity about the source or character of a distribution if the statement is made at or near the time of distribution by the entity's board of directors or other person or group of persons authorized to exercise powers to pay money or transfer property comparable to those of a corporation's board of directors.

#### **§ 11-A-4.2 Distribution from trust or estate**

A trustee shall allocate to income an amount received as a distribution of income from a trust or an estate in which the trust has an interest other than a purchased interest, and shall allocate to principal an amount received as a distribution of principal from such a trust or estate. If a trustee purchases an interest in a trust that is an investment entity, or a decedent or donor transfers an interest in such a trust to a trustee, 11-A-4.1 or 11-A-4.15 applies to a receipt from the trust.

#### **§ 11-A-4.3 Business and other activities conducted by trustee**

(a) If a trustee who conducts a business or other activity determines that it is in the best interest of all the beneficiaries to account separately for the business or activity instead of accounting for it as part of the trust's general accounting records, the trustee may maintain separate accounting records for its transactions, whether or not its assets are segregated from other trust assets.

(b) A trustee who accounts separately for a business or other activity may determine the extent to which its net cash receipts must be retained for working capital, the acquisition or replacement of fixed assets, and other reasonably foreseeable needs of the business or activity, and the extent to which the remaining net cash receipts are accounted for as principal or income in the trust's general accounting records. If a trustee sells assets of the business or other activity, other than in the ordinary course of the business or activity, the trustee shall account for the net amount received as principal in the trust's general accounting records to the extent the trustee determines that the amount

received is no longer required in the conduct of the business.

(c) Activities for which a trustee may maintain separate accounting records include:

(1) retail, manufacturing, service, and other traditional business activities;

(2) farming;

(3) raising and selling livestock and other animals;

(4) management of rental properties;

(5) extraction of minerals and other natural resources;

(6) timber operations; and

(7) activities to which 11-A-4.14 applies.

## **SUBPART 2. RECEIPTS NOT NORMALLY APPORTIONED**

### **§ 11-A-4.4 Principal receipts**

A trustee shall allocate to principal:

(1) to the extent not allocated to income under this article, assets received from a transferor during the transferor's lifetime, a decedent's estate, a trust with a terminating income interest, or a payer under a contract naming the trust or its trustee as beneficiary;

(2) money or other property received from the sale, exchange, liquidation, or change in form of a principal asset, including realized profit, subject to this part;

(3) amounts recovered from third parties to reimburse the trust because of disbursements described in subparagraph 11-A-5.2 (a)(7) or for other reasons to the extent not based on the loss of income;

(4) proceeds of property taken by eminent domain, but a separate award made for the loss of income with respect to an accounting period during which a current income beneficiary had a mandatory income interest is income;

(5) net income received in an accounting period during which there is no beneficiary to whom a trustee may or must distribute income; and

(6) other receipts as provided in subpart 3.

#### **§ 11-A-4.5 Rental property**

To the extent that a trustee accounts for receipts from rental property pursuant to this section, the trustee shall allocate to income an amount received as rent of real or personal property, including an amount received for cancellation or renewal of a lease. An amount received as a refundable deposit, including a security deposit or a deposit that is to be applied as rent for future periods, must be added to principal and held subject to the terms of the lease and is not available for distribution to a beneficiary until the trustee's contractual obligations have been satisfied with respect to that amount.

#### **§ 11-A-4.6 Obligation to pay money**

(a) An amount received as interest, whether determined at a fixed, variable, or floating rate, on an obligation to pay money to the trustee, including an amount received as consideration for prepaying principal, must be allocated to income without any provision for amortization of premium.

(b) A trustee shall allocate to principal an amount received from the sale, redemption, or other disposition of an obligation to pay money to the trustee. The increment in value of a bond or other obligation for the payment of money bearing no stated interest but payable or redeemable at maturity or at a future time at an amount in excess of the amount in consideration of which it was issued is income. If the income accrues pursuant to a fixed schedule of appreciation, such income is distributable to the beneficiary at the time the increment occurs, and the trustee may transfer the amount thereof from principal to income on each such date. Whenever unrealized increment is distributed as income but out of principal the principal shall be reimbursed from the income when realized.

(c) This section does not apply to an obligation to which 11-A-4.9, 11-A-4.10, 11-A-4.11, 11-A-4.12, 11-A-4.14, or 11-A-4.15 applies.

#### **§ 11-A-4.7 Insurance policies and similar contracts**

(a) Except as otherwise provided in paragraph (b), a trustee shall allocate to principal the proceeds of a life insurance policy or other contract in which the trust or its trustee is named as beneficiary, including a contract that insures the trust or its trustee against loss for damage to, destruction of, or loss of title to a trust asset. The trustee shall allocate dividends on an insurance policy to income if the premiums on the policy are paid from income, and to principal if the premiums are paid from principal.

(b) A trustee shall allocate to income proceeds of a contract that insures the trustee against loss of occupancy or other use by an income beneficiary, loss of income, or, subject to 11-A-4.3, loss of profits from a business.

(c) This section does not apply to a contract to which 11-A-4.9 applies.

### **SUBPART 3. RECEIPTS NORMALLY APPORTIONED**

#### **§ 11-A-4.8 Insubstantial allocations not required**

If a trustee determines that an allocation between principal and income required by 11-A-4.9, 11-A-4.10, 11-A-4.11, 11-A-4.12, or 11-A-4.15 is insubstantial, the trustee may allocate the entire amount to principal unless one of the circumstances described in subparagraph 11-2.3 (b)(5) applies to the allocation. This power may be exercised by a cotrustee in the circumstances described in subparagraph 11-2.3 (b)(5) and may be released for the reasons and in the manner described in that section. An allocation is presumed to be insubstantial if:

(1) the amount of the allocation would increase or decrease net income in an accounting period, as determined before the allocation, by less than ten percent; or

(2) the value of the asset producing the receipt for which the allocation would be made is less than ten percent of the total value of the trust's assets at the beginning of the accounting period.

#### **§ 11-A-4.9 Deferred compensation, annuities, and similar payments**

(a) In this section, "payment" means a payment that a trustee may receive over a fixed number of years or during the life of one or more individuals because of services rendered or property transferred to the payer in exchange for future payments. The term includes a payment made in money or property from the payer's general assets or from a separate fund created by the payer, including a private or commercial annuity, an individual retirement account, and a pension, profit-sharing, stock-bonus, or stock-ownership plan.

(b) To the extent that a payment is characterized as interest or a dividend or a payment made in lieu of interest or a dividend, a trustee shall allocate it to income. The trustee shall allocate to principal the balance of the payment and any other payment received in the same accounting period that is not characterized as interest, a dividend, or an equivalent payment.

(c) If no part of a payment is characterized as interest, a dividend, or an equivalent payment, and all or part of the payment is required to be made, a trustee shall allocate to income ten percent of the part that is required to be made during the accounting period and the balance to principal. If no part of a payment is required to be made or the payment received is the entire amount to which the trustee is entitled, the trustee shall allocate the entire payment to principal. For purposes of this paragraph, a payment is not "required to be made" to the extent that it is made because the trustee exercises a right of withdrawal.

(d) If, to obtain an estate tax marital deduction for a trust, a trustee must allocate more of a payment to income than provided for by this section, the trustee shall allocate to income the additional amount necessary to obtain the marital deduction.

(e) This section does not apply to payments to which 11-A-4.10 applies.

#### **§ 11-A-4.10 Liquidating asset**

(a) In this section, "liquidating asset" means an asset whose value will diminish or terminate because the asset is expected to produce receipts for a period of limited duration. The term includes a leasehold, patent, copyright, royalty right, and right to receive

payments during a period of more than one year under an arrangement that does not provide for the payment of interest on the unpaid balance. The term does not include a payment subject to 11-A-4.9, resources subject to 11-A-4.11, timber subject to 11-A-4.12, an activity subject to 11-A-4.14, an asset subject to 11-A-4.15, or any asset for which the trustee establishes a reserve for depreciation under 11-A-5.3.

(b) A trustee shall allocate to income ten percent of the receipts from a liquidating asset and the balance to principal.

#### **§ 11-A-4.11 Minerals, water, and other natural resources**

(a) To the extent that a trustee accounts for receipts from an interest in minerals or other natural resources pursuant to this section, the trustee shall allocate them as follows:

(1) If received as a bonus, delay rental or annual rent on a lease, a receipt of less than one thousand dollars must be allocated to income and a receipt of one thousand dollars or more must be allocated fifteen percent to principal and eighty-five percent to income;

(2) If received from a production payment, a receipt must be allocated to income if and to the extent that the agreement creating the production payment provides a factor for interest or its equivalent. The balance must be allocated to principal;

(3) If received as a royalty, shut-in-well payment, or take-or-pay payment, a receipt must be allocated fifteen percent to principal and eighty-five percent to income;

(4) If an amount is received from a working interest or any other interest not provided for in subparagraph (a)(1), (2), or (3), a receipt must be allocated fifteen percent to principal and eighty-five percent to income.

(b) An amount received on account of an interest in water that is renewable must be allocated to income. If the water is not renewable, ninety percent of the amount must be allocated to principal and the balance to income.

(c) This article applies whether or not a decedent or donor was extracting minerals, water, or other natural resources before the interest became subject to the trust.

(d) If a trust exists on the effective date of this section, the

trustee may allocate receipts from an interest in minerals, water, or other natural resources as provided in this section or in the manner used by the trustee before the effective date of this section. For every trust created after the effective date of this section, the trustee shall allocate receipts from an interest in minerals, water, or other natural resources as provided in this section. If and to the extent that the terms of a trust expressly provide for a different allocation of receipts or grants the trustee discretionary authority to determine the amount of the allocation, this section shall not apply to those receipts.

#### **§ 11-A-4.12 Timber**

(a) To the extent that a trustee accounts for receipts from the sale of timber and related products pursuant to this section, the trustee shall allocate the net receipts:

(1) to income to the extent that the amount of timber removed from the land does not exceed the rate of growth of the timber during the accounting periods in which a beneficiary has a mandatory income interest;

(2) to principal to the extent that the amount of timber removed from the land exceeds the rate of growth of the timber or the net receipts are from the sale of standing timber;

(3) to or between income and principal if the net receipts are from the lease of timberland or from a contract to cut timber from land owned by a trust, by determining the amount of timber removed from the land under the lease or contract and applying the rules in subparagraphs (1) and (2); or

(4) to principal to the extent that advance payments, bonuses, and other payments are not allocated pursuant to subparagraph (1), (2), or (3).

(b) In determining net receipts to be allocated pursuant to paragraph (a), a trustee shall deduct and transfer to principal a reasonable amount for depletion.

(c) This article applies whether or not a decedent or transferor was harvesting timber from the property before it became subject to the trust.

(d) If a trust owns an interest in timberland on the effective date of this article, the trustee may allocate net receipts from the sale of timber and related products as provided in this article or in the manner used by the trustee before the effective date of this article. If the trust acquires an interest in timberland after the effective date of this article, the trustee shall allocate net receipts from the sale of timber and related products as provided in this article.

#### **§ 11-A-4.13 Property not productive of income**

(a) If a gift tax or estate tax marital deduction is allowed for all or part of a trust whose assets consist substantially of property that does not provide the spouse with sufficient income from or use of the trust assets, and if the amounts that the trustee transfers from principal to income under paragraph 11-2.3 (b)(5) and distributes to the spouse from principal pursuant to the terms of the trust are insufficient to provide the spouse with the beneficial enjoyment required to obtain the marital deduction, the spouse may require the trustee to make property productive of income, convert property within a reasonable time, or exercise the power conferred by paragraph 11-2.3 (b)(5). The trustee may decide which action or combination of actions to take.

(b) In cases not governed by paragraph (a), proceeds from the sale or other disposition of an asset are principal without regard to the amount of income the asset produces during any accounting period.

#### **§ 11-A-4.14 Derivatives and options**

(a) In this section, "derivative" means a contract or financial instrument or a combination of contracts and financial instruments which gives a trust the right or obligation to participate in some or all changes in the price of a tangible or intangible asset or group of assets, or changes in a rate, an index of prices or rates, or other market indicator for an asset or a group of assets.

(b) To the extent that a trustee does not account under 11-A-4.3 for transactions in derivatives, the trustee shall allocate to principal receipts from and disbursements made in connection with those

transactions.

(c) If a trustee grants an option to buy property from the trust, whether or not the trust owns the property when the option is granted, grants an option that permits another person to sell property to the trust, or acquires an option to buy property for the trust or an option to sell an asset owned by the trust, and the trustee or other owner of the asset is required to deliver the asset if the option is exercised, an amount received for granting the option must be allocated to principal. An amount paid to acquire the option must be paid from principal. A gain or loss realized upon the exercise of an option, including an option granted to a settlor of the trust for services rendered, must be allocated to principal.

#### **§ 11-A-4.15 Asset-backed securities**

(a) In this section, "asset-backed security" means an asset whose value is based upon the right it gives the owner to receive distributions from the proceeds of financial assets that provide collateral for the security. The term includes an asset that gives the owner the right to receive from the collateral financial assets only the interest or other current return or only the proceeds other than interest or current return. The term does not include an asset to which 11-A-4.1 or 11-A-4.9 applies.

(b) If a trust receives a payment from interest or other current return and from other proceeds of the collateral financial assets, the trustee shall allocate to income the portion of the payment which the payer identifies as being from interest or other current return and shall allocate the balance of the payment to principal.

(c) If a trust receives one or more payments in exchange for the trust's entire interest in an asset-backed security in one accounting period, the trustee shall allocate the payments to principal. If a payment is one of a series of payments that will result in the liquidation of the trust's interest in the security over more than one accounting period, the trustee shall allocate ten percent of the payment to income and the balance to principal.

## **PART 5. ALLOCATION OF DISBURSEMENTS DURING ADMINISTRATION OF TRUST**

### **§ 11-A-5.1 Disbursements from income**

A trustee shall make the following disbursements from income to the extent that they are not disbursements to which subparagraph 11-A-2.1 (2)(B) or (C) applies:

(1) one-third of the regular compensation of any person providing investment advisory or custodial services to the trustee;

(2) if the court shall find that any judicial proceeding primarily concerns income and that it is equitable to charge the expense of such proceeding, or a part thereof, to income, the court may direct that all or a specified part of the expense of such proceeding, including attorney's fees, shall be charged to income;

(3) all of the other ordinary expenses incurred in connection with the administration, management, or preservation of trust property and the distribution of income, including interest, ordinary repairs, regularly recurring taxes assessed against principal; and

(4) recurring premiums on insurance covering the loss of a principal asset or the loss of income from or use of the asset.

### **§ 11-A-5.2 Disbursements from principal**

(a) A trustee shall make the following disbursements from principal:

(1) the remaining two-thirds of the disbursements described in paragraph 11-A-5.1 (1);

(2) all of the trustee's compensation calculated on principal as a fee for acceptance, distribution, or termination, and disbursements made to prepare property for sale;

(3) payments on the principal of a trust debt;

(4) except as provided in paragraph 11-A-5.1 (2), all expenses for accountings, judicial proceedings or other matters that involve both the income and remainder interests or that concern primarily principal, including a proceeding to construe the trust or to protect the trust or its property;

(5) premiums paid on a policy of insurance not described in paragraph

11-A-5.1 (4) of which the trust is the owner and beneficiary;

(6) estate, inheritance, and other transfer taxes, including penalties, apportioned to the trust; and

(7) disbursements related to environmental matters, including reclamation, assessing environmental conditions, remedying and removing environmental contamination, monitoring remedial activities and the release of substances, preventing future releases of substances collecting amounts from persons liable or potentially liable for the costs of those activities, penalties imposed under environmental laws or regulations and other payments made to comply with those laws or regulations, statutory or common law claims by third parties, and defending claims based on environmental matters.

(b) If a principal asset is encumbered with an obligation that requires income from that asset to be paid directly to the creditor, the trustee shall transfer from principal to income an amount equal to the income paid to the creditor in reduction of the principal balance of the obligation.

### **§ 11-A-5.3 Transfers from income to principal for depreciation**

(a) In this section, "depreciation" means a reduction in value due to wear, tear, decay, corrosion, or gradual obsolescence of a fixed asset having a useful life of more than one year.

(b) A trustee may transfer to principal a reasonable amount of the net cash receipts from a principal asset that is subject to depreciation, but may not transfer any amount for depreciation:

(1) of that portion of real property used or available for use by a beneficiary as a residence or of tangible personal property held or made available for the personal use or enjoyment of a beneficiary;

(2) during the administration of a decedent's estate; or

(3) under this section if the trustee is accounting under 11-A-4.3 for the business or activity in which the asset is used.

(c) An amount transferred to principal need not be held as a separate fund.

### **§ 11-A-5.4 Transfers from income to reimburse principal**

(a) If a trustee makes or expects to make a principal disbursement described in this section, the trustee may transfer an appropriate amount from income to principal in one or more accounting periods to reimburse principal or to provide a reserve for future principal disbursements.

(b) Principal disbursements to which paragraph (a) applies include the following, but only to the extent that the trustee has not been and does not expect to be reimbursed by a third party:

(1) an amount chargeable to income but paid from principal because it is unusually large, including extraordinary repairs;

(2) a capital improvement to a principal asset, whether in the form of changes to an existing asset or the construction of a new asset, including special assessments;

(3) disbursements made to prepare property for rental, including tenant allowances, leasehold improvements, and broker's commissions;

(4) periodic payments on an obligation secured by a principal asset to the extent that the amount transferred from income to principal for depreciation is less than the periodic payments; and

(5) disbursements described in subparagraph 11-A-5.2 (a)(7).

(c) If the asset whose ownership gives rise to the disbursements becomes subject to a successive income interest after an income interest ends, a trustee may continue to transfer amounts from income to principal as provided in paragraph (a).

#### **§ 11-A-5.5 Income taxes**

(a) A tax required to be paid by a trustee based on receipts allocated to income must be paid from income.

(b) A tax required to be paid by a trustee based on receipts allocated to principal must be paid from principal, even if the tax is called an income tax by the taxing authority.

(c) A tax required to be paid by a trustee on the trust's share of an entity's taxable income must be paid proportionately:

(1) from income to the extent that receipts from the entity are allocated to income; and

(2) from principal to the extent that:

(A) receipts from the entity are allocated to principal; and

(B) the trust's share of the entity's taxable income exceeds the total receipts described in subparagraph (1) and clause (A).

(d) For purposes of this section, receipt allocated to principal or income must be reduced by the amount distributed to a beneficiary from principal or income for which the trust receives a deduction in calculating the tax.

#### **§ 11-A-5.6 Adjustments between principal and income because of taxes**

A fiduciary may make adjustments between principal and income to offset the shifting of economic interests or tax benefits between income beneficiaries and remainder beneficiaries which arise from:

(1) elections and decisions that the fiduciary makes from time to time regarding tax matters;

(2) an income tax or any other tax that is imposed upon the fiduciary or a beneficiary as a result of a transaction involving or a distribution from the estate or trust; or

(3) the ownership by an estate or trust of an interest in an entity whose taxable income, whether or not distributed, is includable in the taxable income of the estate, trust, or a beneficiary.

### **PART 6. MISCELLANEOUS PROVISIONS**

#### **§ 11-A-6.1 Uniformity of application and construction**

In applying and construing this article, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.

#### **§ 11-A-6.2 Severability clause**

If any provision of this article or its application to any person or circumstance is held invalid, the invalidity does not affect other

provisions or applications of this article which can be given effect without the invalid provision or application, and to this end the provisions of this article are severable.

### **§ 11-A-6.3 Effective date**

This article takes effect on January first, two thousand two.

### **§ 11-A-6.4 Application of article**

Except as specifically provided in the trust instrument, the will, or in this article, this article shall apply to any receipt or expense received or incurred on or after its effective date by any trust or decedent's estate established before, on or after its effective date and whether the asset involved was acquired by the trustee before, on or after its effective date, except that this article shall not apply to a trust while any current beneficiary is interested in a unitrust amount pursuant to subparagraph 11-2.4(b)(1); but it does apply with respect to assets to which such a unitrust may become entitled but prior to their actual receipt into the unitrust.

## **ARTICLE 12**

### **ACTIONS BY CREDITORS AND OTHER PERSONS AGAINST DISTRIBUTEES AND TESTAMENTARY BENEFICIARIES**

#### **PART 1. LIABILITY OF DISTRIBUTEES AND TESTAMENTARY BENEFICIARIES AND ACTION THEREON**

Section 12-1.1 Liability of distributees and testamentary beneficiaries.

12-1.2 Order of liability; preferences.

12-1.3 Extent of liability; judgment debtor's right to indemnity and contribution.

#### **PART 2. RULES GOVERNING ACTION TO ENFORCE LIABILITY**

Section 12-2.1 Action not impaired by failure of creditor or other person to present claim to representative as prescribed by law.

12-2.2 Action may be a joint or several; right to implead.

12-2.3 Effect of application to surrogate to sell real property.

12-2.4 Effect of judgment.

12-2.5 Title of bona fide purchaser from distributee or testamentary beneficiary protected.

## **PART 1. LIABILITY OF DISTRIBUTEES AND TESTAMENTARY BENEFICIARIES AND ACTION THEREON**

### **§ 12-1.1 Liability of distributees and testamentary beneficiaries**

(a) Subject to the other provisions of this article, distributees and testamentary beneficiaries are liable, in an action, to the extent of the value of any property received by them as such, for the debts and reasonable funeral expenses of a decedent, the expenses of administering his estate and all taxes for which the estate is liable, which have not previously been recovered from the personal representative or from any other source described in paragraph (b).

(b) No liability may be imposed upon such distributees or testamentary beneficiaries, under paragraph (a), unless plaintiff establishes satisfactorily to the court that he cannot fully satisfy his claim:

(1) Because there is insufficient property of the estate available for such purpose in the hands of the personal representative;

(2) By action against persons prior in liability to the defendant, under paragraph (a) of 12-1.2, because such persons are not amenable to suit in this state, are insolvent or for any other reason cannot be made to answer for their liabilities; or

(3) By the enforcement, under 3-3.6, of any lien, security interest or other charge he holds against property of the decedent specifically disposed of by will or passing to a distributee, or against the proceeds of any policy of insurance on the life of the decedent payable to a named beneficiary.

### **§ 12-1.2 Order of liability; preferences**

(a) Distributees and testamentary beneficiaries are liable, as

provided in 12-1.1, in the following order:

(1) Distributees.

(2) Residuary beneficiaries.

(3) General beneficiaries. Demonstrative beneficiaries shall be treated as general beneficiaries, to the extent that the property or fund charged with a demonstrative disposition has adeemed.

(4) Specific beneficiaries. Demonstrative beneficiaries shall be treated as specific beneficiaries if the property or fund charged with any demonstrative disposition has not adeemed, to the extent of the value of such property or fund.

(5) A surviving spouse to whom a disposition has been made which qualifies for the estate tax marital deduction.

(b) The order of liability provided in paragraph (a) shall not apply to the liability for an estate or other death tax, under the law of this state or of any other jurisdiction, with respect to any property required to be included in the gross tax estate of a decedent under the provisions of any such law. The apportionment of such estate or other death tax, and the liability, under 12-1.1, of distributees and testamentary beneficiaries consequent to such apportionment are governed by the provisions of 2-1.8.

(c) The express or implied intention of the testator to prefer certain beneficiaries shall be effective to vary the order of liability prescribed by paragraph (a).

(d) If, in an action under this article, it is established to the satisfaction of the court that:

(1) The defendant is liable for the payment of two or more claims, preference in the payment of such claims must be given in the order prescribed by law for payment of the debts of the decedent and the obligations of his estate.

(2) An unsatisfied claim exists which is legally preferred to that of the plaintiff, the existence of such unsatisfied claim is a defense to the action if the aggregate value of the decedent's property passing to defendant and other persons in his order of liability does not exceed the amount of such unsatisfied claim; if in excess of the amount of such unsatisfied claim, the plaintiff may recover such ratable share of the excess as the amount of his claim bears to the claims of all persons in the same order of preference as his.

**§ 12-1.3 Extent of liability; judgment debtor's right to indemnity and contribution**

(a) Although subject, under paragraph (a) of 12-1.1, to a judgment in the full amount of the value of any property received by him, which may exceed his ratable obligation as described herein, the maximum liability to which a distributee or testamentary beneficiary is subject under this article is his ratable obligation, in the proportion that the value of the decedent's property passing to him bears to the value of all such property passing to distributees or beneficiaries, as the case may be, within the same order of liability as his under paragraph (a) of 12-1.2.

(b) Any person against whom a judgment is obtained under this article, upon payment thereof, is entitled:

(1) To be indemnified by any person prior to liability to him under paragraph (a) of 12-1.2, who remains liable under this article but against whom recovery was not available for a reason set forth in subparagraph (b) (2) of 12-1.1.

(2) To contribution, for any sum paid in excess of his ratable obligation as described in paragraph (a), from any person within the same order of liability as his under paragraph (a) of 12-1.2, but only to the extent that such person's ratable obligation is unpaid.

**PART 2. RULES GOVERNING ACTION TO ENFORCE LIABILITY**

**§ 12-2.1 Action not impaired by failure of creditor or other person to present claim to representative as prescribed by law**

The failure of the plaintiff to present his claim to the personal representative as prescribed by law shall not impair his right to maintain an action against distributees or testamentary beneficiaries under this article; but nothing contained herein shall extend the time limited for the commencement of an action to enforce plaintiff's claim.

## **§ 12-2.2 Action may be joint or several; right to implead**

An action may be brought against one or more of the persons subject to liability under this article. A person against whom an action is brought may implead, pursuant to the provisions of CPLR article 10 governing impleader, any person who may be liable to him for indemnity or contribution under paragraph (b) of 12-1.3.

## **§ 12-2.3 Effect of application to surrogate to sell real property**

If, during the pendency of an action to enforce a liability created by this article against a distributee or devisee of real property, a proceeding is pending or is subsequently commenced for the judicial settlement of the account of the personal representative, the action insofar as it affects any real property of the decedent shall be stayed until the accounting proceeding is concluded without an application for an order, under SCPA article 19, to dispose of real property of the decedent for the payment of debts, funeral or administration expenses having been made or, if made, without such an order having been granted. If such an order is granted, the action shall be dismissed as to the real property ordered to be disposed of and the plaintiff remitted to the enforcement of his rights against the proceeds of the real property held by the personal representative. Nothing contained herein precludes a person from asserting any right he may have under this article with respect to any other property of the decedent.

## **§ 12-2.4 Effect of judgment**

A judgment recovered in an action brought under this article is preferred, as a lien on any property of the decedent passing to a defendant against whom the judgment was recovered, to a judgment obtained against such defendant on his personal obligation.

## **§ 12-2.5 Title of bona fide purchaser from distributee or testamentary**

beneficiary protected

The entry and filing of a judgment recovered against a distributee or testamentary beneficiary in an action brought under this article does not affect the rights of a prior purchaser, in good faith and for valuable consideration, from such distributee or beneficiary of any property of the decedent which would otherwise be subject to such judgment, unless, in the case of real property, a notice of pendency had been filed prior to such purchase. When the subsequent purchaser is protected, the judgment is enforceable against the judgment debtor to the extent of the net proceeds received by him upon the disposition of the property.

## ARTICLE 13

### **OTHER PROVISIONS AFFECTING ESTATES**

#### PART 1. ASSETS OF DECEDENT'S ESTATE

Section 13-1.1 Certain assets considered personal property.

13-1.2 Assets; debt due from executor to testator; effect of discharge by will.

13-1.3 Assets chargeable with payment of estate obligations; order in which assets appropriated; abatement.

13-1.4 Action in supreme court to compromise controversies between claimants to estate assets.

#### PART 2. STATUTE OF FRAUDS REQUIREMENTS

Section 13-2.1 Agreements involving a contract to establish a trust, to make a testamentary provision of any kind, and by a personal representative to answer for the debt or default of a decedent, required to be in writing.

13-2.2 Transfers and mortgages of interest in decedents' estates required to be in writing and recorded.

13-2.3 Powers of attorney in relation to decedents' estates required to be in writing and recorded.

#### PART 3. MISCELLANEOUS PROVISIONS

Section 13-3.1 Rights of payees in non-transferable United States savings bonds.

13-3.2 Rights of beneficiaries of pension, retirement, death

benefit, stock bonus and profit-sharing plans, systems or trusts and of beneficiaries of annuities and supplemental insurance contracts.

13-3.3 Designation of trustee to receive proceeds of thrift, savings, pension, retirement, death benefit, stock bonus and profit-sharing plans, systems or trusts, of life, group life, industrial life or accident and health insurance policies and of annuity, endowment and supplemental insurance contracts, and taxation thereof

13-3.4 Payment or delivery of property to foreign fiduciaries.

13-3.5 Action or proceeding by foreign personal or other legal representative.

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#### PART 4. TRANSFER-ON-DEATH SECURITY REGISTRATION

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#### PART 1. ASSETS OF DECEDENT'S ESTATE

##### **§ 13-1.1 Certain assets considered personal property**

(a) For purposes of the administration of an estate, the following assets of the decedent are personal property and together with every other species of personal property pass to the personal representative:

(1) Estates for years in real property, estates from year to year and estates which were held by the decedent for the life of another person.

(2) An estate for years in real property given to an executor for the payment of debts.

(3) Trade fixtures which may be removed without impairing the support of the structure to which they are annexed. All other fixtures annexed to land or structures do not pass to the personal representative, but descend to the distributees or pass to the devisees.

(4) Crops growing on the land of the decedent at the time of his death.

(5) Every kind of produce raised annually by labor or cultivation, except growing grass and fruit ungathered.

(6) Rent reserved to the decedent which had accrued at the time of his death.

(7) Debts secured by mortgages and moneys unpaid on contracts for the sale of lands.

#### **§ 13-1.2 Assets; debt due from executor to testator; effect of discharge by will**

The designation by will of a person as executor does not operate as a discharge or testamentary disposition of any just claim which the testator had against him, but such claim must be included as an asset of the estate. The executor is liable for the value of the claim when it becomes due, and he must apply and distribute the same in the course of administering the estate. The discharge or disposition of such a claim or of a claim against any other person by will shall be treated as a specific disposition for purposes of 13-1.3. Nothing contained herein precludes an executor from raising any defense to a claim by the estate against him which would be available to any other person against whom the estate has a claim.

#### **§ 13-1.3 Assets chargeable with payment of estate obligations; order in which assets appropriated; abatement**

(a) All of the property of a decedent, and any income therefrom in the

course of estate administration, is chargeable with the payment of:

(1) Administration and reasonable funeral expenses, debts of the decedent and any taxes for which the estate is liable.

(2) Unless such property is specifically disposed of, any general dispositions.

(b) In applying such property to the payment of any item specified in paragraph (a), no distinction shall be made between real and personal property.

(c) Whenever such property is insufficient to satisfy both the estate obligations described in subparagraph (a) (1) and all dispositions under the will, interests in the decedent's estate abate, for the purpose of paying such estate obligations, in the following order:

(1) Distributive shares in property not disposed of by will.

(2) Residuary dispositions.

(3) General dispositions. Demonstrative dispositions shall be treated as general dispositions to the extent that the property or fund charged with a demonstrative disposition has adeemed.

(4) Specific dispositions, and any income derived therefrom, ratably, in accordance with the value of the respective interests of the beneficiaries of such dispositions. For the purposes of this section, a demonstrative disposition shall be treated as a specific disposition if the property or fund charged with any demonstrative disposition has not adeemed, to the extent of the value of such property or fund.

(5) Any disposition to a surviving spouse which qualifies for the estate tax marital deduction.

(d) The order of abatement provided in paragraph (c) shall not apply to the payment of an estate or other death tax, under the law of this state or of any other jurisdiction, with respect to any property required to be included in the gross tax estate of a decedent under the provisions of any such law. The apportionment of such estate or other death tax, and the abatement of interests in the decedent's estate consequent to such apportionment, are governed by the provisions of 2-1.8.

(e) Whenever the provisions of this section are inconsistent with the express or implied intention of the testator to distinguish real property from personal property or to prefer certain beneficiaries under his will to others, the property of the estate shall be applied and the

interests of beneficiaries under the will shall abate in such manner as is necessary to give effect to the intention of the testator.

(f) In the event that any property of the estate is applied to the payment of estate obligations in contravention of the order of abatement prescribed by this section, beneficiaries whose rights have been so impaired are entitled to be indemnified by other beneficiaries or distributees, as the case may be, so as to accomplish an abatement in accordance with the provisions of this section, and the amount of such indemnity shall constitute a charge on the interests of the beneficiaries or distributees liable therefor. Nothing in this paragraph shall relieve the personal representative of his liability to beneficiaries whose rights have been so impaired.

#### **§ 13-1.4 Action in supreme court to compromise controversies between claimants to estate assets**

An action may be maintained in the supreme court to compromise controversies between claimants to the property of an estate in accordance with and subject to the provisions of SCPA 2106.

### **PART 2. STATUTE OF FRAUDS REQUIREMENTS**

#### **§ 13-2.1 Agreements involving a contract to establish a trust, to make a testamentary provision of any kind, and by a personal representative to answer for the debt or default of a decedent, required to be in writing**

(a) Every agreement, promise or undertaking is unenforceable unless it or some note or memorandum thereof is in writing and subscribed by the party to be charged therewith, or by his lawful agent, if such agreement, promise or undertaking:

- (1) Is a contract to establish a trust.
- (2) Is a contract to make a testamentary provision of any kind.
- (3) Is a promise by a personal representative to answer for the debt or default of his decedent.

(b) A contract to make a joint will, or not to revoke a joint will, if executed after the effective date of this paragraph can be established only by an express statement in the will that the instrument is a joint will and that the provisions thereof are intended to constitute a contract between the parties.

**§ 13-2.2 Transfers and mortgages of interest in decedents' estates**  
required to be in writing and recorded

(a) Every conveyance, assignment or other transfer of, and every mortgage, security interest in or other charge upon the interest, situated in this state, of a person in the estate of a decedent, which is situated in this state, shall be in writing and acknowledged or proved in the manner prescribed by the laws of this state for the recording of a conveyance of real property. Any such instrument may be recorded as hereinafter provided, and if not so recorded, it is void against any subsequent purchaser or mortgagee of such interest, in good faith and for valuable consideration, whose conveyance or mortgage is first duly recorded. If such interest is entirely in the personal property of a decedent, the conveyance or mortgage may be recorded in the office of the surrogate granting letters on such decedent's estate or, if no such letters have been granted, in the office of the surrogate having jurisdiction to grant them. If a security interest, subject to article 9 of the uniform commercial code, is created by a transaction described in this paragraph, a financing statement shall be filed as required by section 9--501 of such code. If such interest is in both the personal and the real property of a decedent, the conveyance or mortgage may be recorded in the office of such surrogate and in the office of the recording official of the county in which the real property is situated and, if a security interest in personal property is created, a financing statement shall be filed in accordance with section 9--401 of the uniform commercial code. Such a conveyance or mortgage, when so recorded, shall be indexed under the name of the decedent in a book to be kept for that purpose by each recording officer.

(b) Such filing or recording shall not be notice of such conveyance, assignment or other transfer of, or mortgage, security interest or other charge upon the interest, situated in this state, of any person in the

estate of a decedent so as to charge a personal representative of the estate with liability for payment to a beneficiary of the estate, unless and until he has received actual notice of any such transfer, mortgage or other charge.

(c) In case of a conflict between this section and article 9 of the uniform commercial code, this section controls.

**§ 13-2.3 Powers of attorney in relation to decedents' estates required to be in writing and recorded**

(a) Every power of attorney relating to an interest in a decedent's estate and every conveyance or assignment of an interest in an estate, or similar instrument, which contains an express or implied authorization or delegation of power to act thereunder shall be in writing and acknowledged or proved in the manner prescribed by the laws of this state for the recording of a conveyance of real property and, subject to the rules or order of the surrogate hereinafter provided, shall be recorded in the office of the surrogate granting letters on such decedent's estate or, if no such letters have been granted, in the office of the surrogate having jurisdiction to grant them. Such recording confers on the surrogate jurisdiction over the grantor of such power of attorney, the attorney in fact therein named and any other person acting thereunder. No attorney in fact named in any power of attorney or in such other instrument nor any person acting thereunder shall perform any act under such instrument unless it has been duly recorded.

(b) The surrogate may:

(1) Prescribe by rules of court or by order, consistent with the provisions of this section, the form, content, manner of execution and the conditions attached to the recording of every such instrument.

(2) Inquire into and determine the validity of every such instrument and require proof of the amount of compensation or expenses charged or to be charged by the attorney in fact and every person acting thereunder.

(3) In a proceeding authorized by SCPA 2112 or in any appropriate proceeding, fix and determine the validity and reasonableness of such compensation and expenses, whether or not the same have been previously

fixed by agreement and whether or not fixed in the instrument so recorded, or otherwise.

(4) Prescribe regulations and exact a bond or undertaking to assure the payment of funds to the principal.

(c) Notwithstanding any provision contained therein, no power of attorney or other instrument which designates an agent to act for the principal shall be irrevocable, nor shall any agreement for the compensation of, or the payment of expenses by the attorney in fact or other person acting under the instrument create a power coupled with an interest in the subject matter of the agency or render the instrument irrevocable.

(d) Nothing contained herein shall authorize the practice of law by an attorney in fact or other person acting under an instrument described in this section, who is not an attorney duly licensed to practice law in the state of New York.

(e) Notwithstanding the provisions of any other statute or rule, no instrument containing a delegation of powers, assignment of interest, fee arrangement, or any instrument of like import created for the purpose of participating on behalf of an individual in any application seeking the recovery of property pursuant to section fourteen hundred sixteen of the abandoned property law or section thirteen hundred ten of the surrogate's court procedure act, nor any power of attorney, shall be accepted for filing or recording by the surrogate's court of a particular county unless the amount at issue is in excess of one thousand dollars or a fiduciary, as that term is defined by subdivision twenty-one of section one hundred three of the surrogate's court procedure act, has been appointed, or a proceeding for the appointment of a fiduciary is pending in such court. The provisions of paragraph (b) of this section shall apply to all instruments eligible for filing and recording hereunder.

### **PART 3. MISCELLANEOUS PROVISIONS**

#### **§ 13-3.1 Rights of payees in non-transferable United States savings bonds**

Where any United States savings bond is payable to a designated person, whether as owner, co-owner or beneficiary, and such bond is not transferable, the right of such person to receive payment of the bond according to its terms, and the ownership of the money so received, shall not be impaired or defeated by any statute or rule of law governing the transfer of property by will, gift or intestacy, except as provided in section 5-1.1-A; provided further that nothing herein shall limit article 10 of the debtor and creditor law or 2-1.8.

**§ 13-3.2 Rights of beneficiaries of pension, retirement, death benefit, stock bonus and profit-sharing plans, systems or trusts and of beneficiaries of annuities and supplemental insurance contracts**

(a) If a person is entitled to receive (1) payment in money, securities or other property under a pension, retirement, death benefit, stock bonus or profit-sharing plan, system or trust or (2) money payable by an insurance company or a savings bank authorized to conduct the business of life insurance under an annuity or pure endowment contract or a policy of life, group life, industrial life or accident and health insurance, or if a contract made by such an insurer relating to the payment of proceeds or avails of such insurance designates a payee or beneficiary to receive such payment upon the death of the person making the designation or another, the rights of persons so entitled or designated and the ownership of money, securities or other property thereby received shall not be impaired or defeated by any statute or rule of law governing the transfer of property by will, gift or intestacy.

(b) This section does not limit article 10 of the debtor and creditor law, articles 10-C and 26 of the tax law, or 2-1.8, 5-1.1-A or 13-3.6.

(c) Paragraph (a) applies although a designation is revocable or subject to change by the person who makes it, and although the money, securities or other property receivable thereunder are not yet payable at the time the designation is made or are subject to withdrawal, collection or assignment by the person making the designation.

(d) A person entitled to receive payment includes:

(1) An employee or participant in a pension, retirement, death benefit, stock bonus or profit-sharing plan, system or trust.

(2) The owner or person purchasing an annuity, the person insured or the person effecting insurance, the person effecting a contract relating to payment of the proceeds or avails of a policy of insurance or an annuity or pure endowment contract.

(3) Any person entitled to receive payment by reason of a payee or beneficiary designation described in this section.

(e) A designation of a beneficiary or payee to receive payment upon death of the person making the designation or another must be made in writing and signed by the person making the designation and be:

(1) Agreed to by the employer or made in accordance with the rules prescribed for the pension, retirement, death benefit, stock bonus or profit-sharing plan, system or trust.

(2) Agreed to by the insurance company or the savings bank authorized to conduct the business of life insurance, as the case may be.

(f) This section applies to designations heretofore or hereafter made by persons who die on or after the date this section takes effect. This section does not invalidate any contract or designation which is valid without regard to this section.

**§ 13-3.3 Designation of trustee to receive proceeds of thrift, savings, pension, retirement, death benefit, stock bonus and profit-sharing plans, systems or trusts, of life, group life, industrial life or accident and health insurance policies and of annuity, endowment and supplemental insurance contracts, and taxation thereof**

(a) The proceeds of thrift, savings, pension, retirement, death benefit, stock bonus and profit-sharing plans, systems or trusts, of life, group life, industrial life or accident and health insurance policies and of annuity, endowment and supplemental insurance contracts (hereinafter referred to as "proceeds") may be made payable to a trustee designated as beneficiary in the manner prescribed by this section and named as:

(1) Trustee under a trust agreement or declaration of trust in existence at the date of such designation, and identified in such

designation, and such proceeds shall be paid to such trustee and be held and disposed of in accordance with the terms of such trust agreement or declaration of trust, including any amendments thereto, as they appear in writing on the date of the death of the insured, employee or participant. It shall not be necessary to the validity of any such trust agreement or declaration of trust that it have a trust corpus other than the right of the trustee as beneficiary to receive such proceeds.

(2) Trustee of a trust to be established by will, and upon qualification and issuance of letters of trusteeship such proceeds shall be payable to the trustee to be held and disposed of in accordance with the terms of such will as a testamentary trust. A designation which in substance names as such beneficiary the trustee under the will of the insured, employee or participant, shall be taken to refer to the will of such person actually admitted to probate, whether executed before or after the making of such designation.

(b) If no qualified trustee claims such proceeds from the insurer or other payor within eighteen months after the death of the insured, employee or participant, or if satisfactory evidence is furnished to the insurer or other payor within such period showing that there is or will be no trustee to receive such proceeds, such proceeds shall be paid by the insurer or other payor to the personal representative or assigns of the insured, employee or participant, unless otherwise provided by agreement with the insurer or other payor during the lifetime of the insured, employee or participant.

(c) Except to the extent otherwise provided by the trust agreement, declaration of trust or will, proceeds received by the trustee shall not be subject to the debts of the insured, employee or participant, to any greater extent than if such proceeds were payable to the beneficiaries named in the trust, and for all purposes including transfer or estate tax purposes they shall not be deemed payable to or for the benefit of the estate of the insured, employee or participant.

(d) Proceeds so held in trust may be commingled with any other assets which may properly become part of such trust.

(e) Nothing in this section shall effect the validity of any designation heretofore made of the trustee of any trust established under a trust agreement or declaration of trust or by will.

(f) This section shall be construed as declaring the law as it existed

prior to its enactment and not as modifying it.

#### **§ 13-3.4 Payment or delivery of property to foreign fiduciaries**

(a) Whenever any foreign fiduciary, by whatever title he is designated, of the property or estate of a non-domiciliary infant, incompetent or decedent is authorized, by the laws of the foreign jurisdiction where the infant or incompetent is domiciled or the decedent was domiciled, to receive any personal property in the possession or control of any person or fiduciary in this state, such person or fiduciary may pay or deliver the property to such foreign fiduciary without an order of the court, and the receipt and acquittance from such foreign fiduciary is a sufficient release and discharge of the person or fiduciary paying or delivering such property. For purposes of this section the status of a person as an "infant" or "incompetent" shall be determined by the law of his domicile.

(b) No person or fiduciary shall be released and discharged, as provided in paragraph (a), who:

(1) Has received written notice of the appointment, in this state, of a principal or ancillary representative of the property or estate, or of the existence of creditors, in this state, of such infant, incompetent or decedent.

(2) In the case of a testamentary disposition or a distributive share of a decedent's estate, has reason to believe that such foreign fiduciary or the persons whom he represents would not have the benefit, use or control of such disposition or distributive share.

#### **§ 13-3.5 Action or proceeding by foreign personal or other legal representative**

(a) A personal or other legal representative of a non-domiciliary decedent, duly appointed or authorized by the law of any other state, territory or other jurisdiction of the United States where the decedent was domiciled, may sue in any court of this state in his capacity as personal or other legal representative in the same manner and under the same restrictions as a person residing outside of the state may sue, subject to the following:

(1) Within ten days after commencing such action or proceeding, the personal or other legal representative shall file in the office of the clerk of the court in which such action or proceeding is brought a copy of the letters issued to such representative, duly authenticated as prescribed by CPLR 4542. When the suit is brought by a foreign legal representative who is not a personal representative he shall file an affidavit setting forth the facts authorizing him to act for the decedent, and such other proof required by the court in which the action or proceeding is brought. The court may at any time, in its discretion, require the filing of authenticated copies of other papers or a bond or additional bond in an amount fixed by the court to protect the rights of interested residents of this state.

(2) Within ten days after commencing such action or proceeding, the personal or other legal representative shall file an affidavit stating that:

(A) Such decedent is not indebted to any resident of this state.

(B) More than six months have elapsed since the decedent's death and no petition for ancillary administration of the estate of such decedent has been filed in any court of this state. If made upon information and belief, such affidavit shall state the sources of affiant's information and the grounds for his belief.

(C) If it appears that the decedent is indebted to a resident of this state or that a petition for ancillary administration has been filed in this state, notice to the creditor or petitioner must be given in such manner as the court may direct.

(3) Failure to comply with the requirements of subparagraphs (1) and (2) shall stay the action or proceeding and the defendant's time to answer or move shall be extended for twenty days after plaintiff has served defendant with notice of compliance with such requirements.

(4) If ancillary letters testamentary or of administration are issued in this state after such action or proceeding is commenced, upon motion of the ancillary representative the court in which such action or proceeding is pending shall substitute the ancillary representative for the personal representative or other legal representative and shall hear and determine such action or proceeding as if the same were originally instituted by the ancillary representative, and the benefits of the judgment shall inure to the ancillary representative and be administered

by him.

### **§ 13-3.6 Disaffirmance of fraudulent acts by personal representative and others**

A fiduciary may, for the benefit of creditors or others interested in property held in trust, treat as void any act done, or disposition or agreement made in fraud of the rights of any creditor, including himself, interested in such property, and a person who fraudulently receives, takes or in any manner interferes with the property of a deceased or insolvent person is liable to such fiduciary or a receiver for such property or the value thereof, and for all damages caused by such act to the trust estate. A creditor of a deceased insolvent debtor, having a claim against the estate of such debtor exceeding in amount the sum of one hundred dollars may, without obtaining a judgment on such claim, in like manner, for the benefit of himself and other creditors interested in such property, treat as void any act done or disposition or agreement made in fraud of creditors or maintain an action to set aside such act, disposition or agreement. Such claim, if disputed, may be established in such action. The judgment in such action may provide for the sale of the property involved, when a disposition thereof is set aside, and for the payment of the proceeds thereof into the appropriate surrogate's court to be administered according to law.

## **PART 4. TRANSFER-ON-DEATH SECURITY REGISTRATION**

### **Section 13-4.1 Definitions**

#### **13-4.2 Registration in beneficiary form; sole or joint tenancy ownership**

#### **13-4.3 Applicable law**

#### **13-4.4 Origination of registration in beneficiary form**

#### **13-4.5 Form of registration in beneficiary form**

#### **13-4.6 Effect of registration in beneficiary form**

#### **13-4.7 Ownership on death of owner**

#### **13-4.8 Protection of registering entity**

- 13-4.9 Nontestamentary transfer on death
- 13-4.10 Terms, conditions, and forms
- 13-4.11 Rules of construction
- 13-4.12 Application

## **§ 13-4.1 Definitions**

As used in this part unless the context otherwise requires:

(a) "Beneficiary form" means a registration of a security which indicates the present owner of the security and the intention of the owner regarding the person who will become the owner of the security upon the death of the owner.

(b) "Devisee" means any person to whom real property is transferred by will.

(c) "Distributee" means any person entitled to take or share in the property of a decedent under the statutes governing descent and distribution.

(d) "Legatee" means any person designated to receive a transfer by will of personal property.

(e) "Person" means an individual, a corporation, an organization or other legal entity.

(f) "Personal representative" includes executor, administrator, successor personal representative, preliminary executor, temporary administrator and persons who perform substantially the same function under the law governing their status.

(g) "Property" includes both real and personal property or any interest therein and means anything that may be the subject of ownership.

(h) "Register" including its derivatives, means to issue a certificate showing the ownership of a certificated security or, in the case of an uncertificated security, to initiate or transfer an account showing ownership of securities.

(i) "Registering entity" means a person who originates or transfers a security title by registration, and includes a broker or banking institution, as defined in paragraph (b) of subdivision three of section nine-f of the banking law maintaining security accounts for customers

and a transfer agent or other person acting for or as an issuer of securities.

(j) "Security" means a share, participation or other interest in property, in a business or in an obligation of an enterprise or other issuer, and includes a certificated security, an uncertificated security and a security account.

(k) "Security account" means (i) a reinvestment account associated with a security, a securities account with a broker or banking institution, as defined in paragraph (b) of subdivision three of section nine-f of the banking law, a cash balance in a brokerage account or securities account, cash, interest, earnings, or dividends earned or declared on a security in an account, a reinvestment account or a brokerage account, whether or not credited to the account before the owner's death, or (ii) a cash balance or other property held for or due to the owner of a security as a replacement for or product of an account security, whether or not credited to the account before the owner's death.

(l) "State" includes any state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession subject to the legislative authority of the United States.

#### **§ 13-4.2 Registration in beneficiary form; sole or joint tenancy ownership**

Only individuals whose registration of a security shows sole ownership by one individual or multiple ownership by two or more with right of survivorship, rather than as tenants in common, may obtain registration in beneficiary form. Multiple owners of a security registered in beneficiary form hold as joint tenants with right of survivorship, as tenants by the entirety or as owners of community property held in survivorship form, and not as tenants in common.

#### **§ 13-4.3 Applicable law**

A security may be registered in beneficiary form if the form is

authorized by this or a similar law of the state of organization of the issue or registering entity, the location of the registering entity's principal office, the office of its transfer agent or its office making the registration, or by this or a similar statute of the law of the state listed as the owner's address at the time of registration. A registration governed by the law of a jurisdiction in which this or a similar law is not in force or was not in force when a registration in beneficiary form was made is nevertheless presumed to be valid and authorized as a matter of contract law.

#### **§ 13-4.4 Origination of registration in beneficiary form**

A security, whether evidenced by certificate or account, is registered in beneficiary form when the registration includes a designation of a beneficiary to take the ownership at the death of the owner or the deaths of all multiple owners.

#### **§ 13-4.5 Form of registration in beneficiary form**

Registration in beneficiary form may be shown by the words "transfer on death" or the abbreviation "TOD", or by the words "pay on death" or the abbreviation "POD", after the name of the registered owner and before the name of the beneficiary.

#### **§ 13-4.6 Effect of registration in beneficiary form**

(a) The designation of a TOD beneficiary on a registration in beneficiary form has no effect on ownership until the owner's death. A registration of a security in beneficiary form may be canceled or changed at any time by the sole owner or all then surviving owners without the consent of the beneficiary.

(b) A registration in beneficiary form can be revoked or amended by an express direction in the owner's will which specifically refers to such registration.

#### **§ 13-4.7 Ownership on death of owner**

On death of a sole owner or the last to die of all multiple owners, ownership of securities registered in beneficiary form passes to the beneficiary or beneficiaries who survive all owners. On proof of death of all owners and compliance with any applicable requirements of the registering entity, a security registered in beneficiary form may be reregistered in the name of the beneficiary or beneficiaries who survived the death of all owners. Until division of the security after the death of all owners, multiple beneficiaries surviving the death of all owners hold their interests as tenants in common. If no beneficiary survives the death of all owners, the security belongs to the estate of the deceased sole owner or the estate of the last to die of all multiple owners.

#### **§ 13-4.8 Protection of registering entity**

(a) A registering entity is not required to offer or to accept a request for security registration in beneficiary form. If a registration in beneficiary form is offered by a registering entity, the owner requesting registration in beneficiary form assents to the protections given to the registering entity by this part.

(b) By accepting a request for registration of a security in beneficiary form, the registering entity agrees that the registration will be implemented on death of the deceased owner as provided in this part.

(c) A registering entity is discharged from all claims to a security by the estate, creditors, distributees, legatees or devisees of a deceased owner if it registers a transfer of the security in accordance with section 13-4.7 and does so in good faith reliance (i) on the registration, (ii) on this part, and (iii) on information provided to it by affidavit of the personal representative of the deceased owner, or by the surviving beneficiary or by the surviving beneficiary's representatives, or other information available to the registering entity. The protections of this part do not extend to a reregistration or payment made after a registering entity has received written notice

from any claimant to any interest in the security objecting to implementation of a registration in beneficiary form. No other notice or other information available to the registering entity affects its right to protection under this part.

(d) The protection provided by this part to the registering entity of a security does not affect the rights of beneficiaries in disputes between themselves and other claimants to ownership of the security transferred or its value or proceeds.

#### **§ 13-4.9 Nontestamentary transfer on death**

(a) A transfer on death resulting from a registration in beneficiary form is effective by reason of the contract regarding the registration between the owner and the registering entity and this part and is not testamentary.

(b) This part does not limit the rights of creditors of security owners against beneficiaries and other transferees under other laws of this state.

#### **§ 13-4.10 Terms, conditions, and forms**

(a) A registering entity offering to accept registrations in beneficiary form may establish the terms and conditions under which it will receive requests (i) for registrations in beneficiary form, and (ii) for implementation of registration in beneficiary form, including requests for cancellation of previously registered TOD beneficiary designations and requests for reregistration to effect a change of beneficiary. The terms and conditions so established may provide for proving death, avoiding or resolving any problems concerning fractional shares, designating primary and contingent beneficiaries, and substituting a named beneficiary's descendants to take in the place of the named beneficiary in the event of the beneficiary's death. Substitution may be indicated by appending to the name of the primary beneficiary in letters LDPS, standing for "lineal descendants per stirpes", or in letters LDPR, standing for "lineal descendants by representation". This designation substitutes a deceased beneficiary's descendants who survive the owner for a beneficiary who fails to so

survive, the descendants to be identified and to share in accordance with the law of the beneficiary's domicile at the owner's death governing inheritance by descendants of an intestate. Other forms of identifying beneficiaries who are to take on one or more contingencies, and rules for providing proofs and assurances needed to satisfy reasonable concerns by registering entities regarding conditions and identities relevant to accurate implementation of registrations in beneficiary form, may be contained in a registering entity's terms and conditions.

(b) The following are illustrations of registrations in beneficiary form which a registering entity may authorize:

(1) Sole owner-sole beneficiary: John S Brown TOD (or POD) John S Brown Jr.

(2) Multiple owners-sole beneficiary: John S Brown Mary B Brown JT TEN TOD John S Brown Jr.

(3) Multiple owners-primary and secondary (substituted) beneficiaries: John S Brown Mary B Brown JT TEN TOD John S Brown Jr SUB BENE Peter Q Brown or John S Brown Mary B Brown JT TEN TOD John S Brown Jr LDPS.

#### **§ 13-4.11 Rules of construction**

(a) This part shall be liberally construed and applied to promote its underlying purposes and policy and to make uniform the laws with respect to the subject of this part among states enacting it.

(b) Unless displaced by the particular provisions of this part, the principles of law and equity supplement its provisions.

#### **§ 13-4.12 Application**

This part applies to registrations of securities in beneficiary form made before, on or after January first, two thousand six, by decedents dying on or after January first, two thousand six.

### **ARTICLE 13-A**

### **ADMINISTRATION OF DIGITAL ASSETS SUMMARY OF ARTICLE**

## PART 1. DEFINITIONS

Section 13-A-1 Definitions.

## PART 2. APPLICABILITY, PROCEDURE FOR DISCLOSURE, USER DIRECTIONS

Section 13-A-2.1 Applicability.

13-A-2.2 User direction for disclosure of digital assets.

13-A-2.3 Terms-of-service agreement.

13-A-2.4 Procedure for disclosing digital assets.

## PART 3. DISCLOSURE OF DIGITAL ASSETS TO FIDUCIARY

Section 13-A-3.1 Disclosure of content of electronic communications of deceased user.

13-A-3.2 Disclosure of other digital assets of deceased user.

13-A-3.3 Disclosure of content of electronic communications of principal.

13-A-3.4 Disclosure of other digital assets of principal.

13-A-3.5 Disclosure of digital assets held in trust when trustee is original user.

13-A-3.6 Disclosure of contents of electronic communications held in trust when trustee not original user.

13-A-3.7 Disclosure of other digital assets held in trust when trustee not original user.

13-A-3.8 Disclosure of digital assets to guardian of ward.

## PART 4. FIDUCIARY DUTY AND AUTHORITY, COMPLIANCE AND IMMUNITY

Section 13-A-4.1 Fiduciary duty and authority.

13-A-4.2 Custodian compliance and immunity.

## PART 5. MISCELLANEOUS PROVISIONS

Section 13-A-5.1 Relation to electronic signature in global and national commerce act.

13-A-5.2 Severability.

## PART 1. DEFINITIONS

### § 13-A-1 Definitions

In this article the following terms shall have the following meanings:

(a) "Account" means an arrangement under a terms-of-service agreement

in which a custodian carries, maintains, processes, receives, or stores a digital asset of the user or provides goods or services to the user.

(b) "Agent" means a person granted authority to act as attorney-in-fact for the principal under a power of attorney and includes the original agent or any co-agent or successor agent.

(c) "Carries" means engages in the transmission of an electronic communication.

(d) "Catalogue of electronic communications" means information that identifies each person with which a user has had an electronic communication, the time and date of the communication, and the electronic address of the person.

(e) "Content of an electronic communication" means information concerning the substance or meaning of the communication which:

(1) has been sent or received by a user;

(2) is in electronic storage by a custodian providing an electronic-communication service to the public or is carried or maintained by a custodian providing a remote-computing service to the public; and

(3) is not readily accessible to the public.

(f) "Court" means the court in this state having jurisdiction in matters relating to the content of this article.

(g) "Custodian" means a person that carries, maintains, processes, receives, or stores a digital asset of a user.

(h) "Designated recipient" means a person chosen by a user using an online tool to administer digital assets of the user.

(i) "Digital asset" means an electronic record in which an individual has a right or interest. The term does not include an underlying asset or liability unless the asset or liability is itself an electronic record.

(j) "Electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

(k) "Electronic communication" has the meaning set forth in 18 U.S.C. section 2510(12), as amended.

(l) "Electronic-communication service" means a custodian that provides to a user the ability to send or receive an electronic communication.

(m) "Fiduciary" includes an executor, preliminary executor,

administrator, temporary administrator, voluntary administrator, personal representative, guardian, agent, or trustee. This term includes the successor to any fiduciary.

(n) "Guardian" means a person who has been appointed as a guardian by a court of this state pursuant to the surrogate's court procedure act or the mental hygiene law.

(o) "Information" means data, metadata, Internet protocol address, user login information, text, images, videos, sounds, codes, computer programs, software, databases, or similar intelligence of any nature.

(p) "Online tool" means an electronic service provided by a custodian that allows the user, in an agreement distinct from the terms-of-service agreement between the custodian and user, to provide directions for disclosure or nondisclosure of digital assets to a third person.

(q) "Person" means a natural person, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, business or nonprofit entity, public corporation, government or governmental subdivision, agency, or instrumentality, or other legal or commercial entity, board and the state.

(r) "Power of attorney" means a record that grants an agent authority to act in the place of a principal.

(s) "Principal" means an individual who grants authority to an agent in a power of attorney.

(t) "Protective order" means an order appointing a guardian or another order related to management of a ward's property.

(u) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(v) "Remote-computing service" means a custodian that provides to a user computer-processing services or the storage of digital assets by means of an electronic communications system, as defined in 18 U.S.C. section 2510(14), as amended.

(w) "Terms-of-service agreement" means an agreement that controls the relationship between a user and a custodian.

(x) "Trustee" includes an original additional. and successor trustee, and a co-trustee.

(y) "User" means a person that has an account with a custodian.

(z) "Ward" means an individual for whom a guardian has been appointed

by a court of this state pursuant to the surrogate's court procedure act or the mental hygiene law. The term includes an individual for whom an application of guardianship is pending.

## **PART 2. APPLICABILITY; PROCEDURE FOR DISCLOSURE; USER DIRECTIONS**

### **§ 13-A-2.1 Applicability**

(a) This article applies to:

(1) a fiduciary acting under a will, trust or power of attorney executed before, on, or after the effective date of this article;

(2) an executor, administrator or personal representative acting for a decedent who died before, on, or after the effective date of this article;

(3) a guardianship proceeding commenced before, on, or after the effective date of this article; and

(4) a trustee acting under a trust created before, on, or after the effective date of this article.

(b) This article applies to a custodian if the user resides in this state or resided in this state at the time of the user's death.

(c) This article does not apply to a digital asset of an employer used by an employee in the ordinary course of the employer's business.

### **§ 13-A-2.2 User direction for disclosure of digital assets**

(a) A user may use an online tool to direct the custodian to disclose to a designated recipient or not to disclose some or all of the user's digital assets, including the content of electronic communications. If the online tool allows the user to modify or delete a direction at all times, a direction regarding disclosure using an online tool overrides a contrary direction by the user in a will, trust, power of attorney, or other record.

(b) If a user has not used an online tool to give direction under paragraph (a) or if the custodian has not provided an online tool, the user may allow or prohibit in a will, trust, power of attorney, or other record, disclosure to a fiduciary of some or all of the user's digital

assets, including the content of electronic communications sent or received by the user.

(c) A user's direction under paragraph (a) or (b) overrides a contrary provision in a terms-of-service agreement that does not require the user to act affirmatively and distinctly from the user's assent to the terms of service.

### **§ 13-A-2.3 Terms-of-service agreement**

(a) This article does not change or impair a right of a custodian or a user under a terms-of-service agreement to access and use digital assets of the user.

(b) This article does not give a fiduciary or a designated recipient any new or expanded rights other than those held by the user for whom, or for whose estate, the fiduciary or designated recipient acts or represents.

(c) A fiduciary's or designated recipient's access to digital assets may be modified or eliminated by a user, by federal law, or by a terms-of-service agreement if the user has not provided direction under section 13-A-2.2.

### **§ 13-A-2.4 Procedure for disclosing digital assets**

(a) When disclosing digital assets of a user under this article, the custodian may at its sole discretion:

(1) grant a fiduciary or designated recipient full access to the user's account;

(2) grant a fiduciary or designated recipient partial access to the user's account sufficient to perform the tasks with which the fiduciary or designated recipient is charged; or

(3) provide a fiduciary or designated recipient a copy in a record of any digital asset that, on the date the custodian received the request for disclosure, the user could have accessed if the user were alive and had full capacity and access to the account.

(b) A custodian may assess a reasonable administrative charge for the cost of disclosing digital assets under this article.

(c) A custodian need not disclose under this article a digital asset

deleted by a user.

(d) If a user directs or a fiduciary requests a custodian to disclose under this article some, but not all, of the user's digital assets, the custodian need not disclose the assets if segregation of the assets would impose an undue burden on the custodian. If the custodian believes the direction or request imposes an undue burden, the custodian or fiduciary may seek an order from the court to disclose:

- (1) a subset limited by date of the user's digital assets;
- (2) all of the user's digital assets to the fiduciary or designated recipient;
- (3) none of the user's digital assets; or
- (4) all of the user's digital assets to the court for review in camera.

### **PART 3. DISCLOSURE OF DIGITAL ASSETS TO FIDUCIARY**

#### **§ 13-A-3.1 Disclosure of content of electronic communications of deceased user**

If a deceased user consented or a court directs disclosure of the contents of electronic communications of the user, the custodian shall disclose to the executor, administrator or personal representative of the estate of the user the content of an electronic communication sent or received by the user if the executor, administrator or representative gives the custodian:

- (a) a written request for disclosure in physical or electronic form;
- (b) a copy of the death certificate of the user;
- (c) a certified copy of the letter of appointment of the executor, administrator, or personal representative or a small-estate affidavit or court order;
- (d) unless the user provided direction using an online tool, a copy of the user's will, trust, or other record evidencing the user's consent to disclosure of the content of electronic communications; and
- (e) if requested by the custodian:
  - (1) a number, username, address, or other unique subscriber or account

identifier assigned by the custodian to identify the user's account;

(2) evidence linking the account to the user; or

(3) a finding by the court that:

(A) the user had a specific account with the custodian, identifiable by the information specified in subparagraph (1);

(B) disclosure of the content of electronic communications of the user would not violate 18 U.S.C. section 2701 et seq., as amended, 47 U.S.C. section 222, as amended, or other applicable law;

(C) unless the user provided direction using an online tool, the user consented to disclosure of the content of electronic communications; or

(D) disclosure of the content of electronic communications of the user is reasonably necessary for administration of the estate.

### **§ 13-A-3.2 Disclosure of other digital assets of deceased user**

Unless the user prohibited disclosure of digital assets or the court directs otherwise, a custodian shall disclose to the executor, administrator or personal representative of the estate of a deceased user a catalogue of electronic communications sent or received by the user and digital assets, other than the content of electronic communications, of the user, if the executor, administrator or personal representative gives the custodian:

(a) a written request for disclosure in physical or electronic form;

(b) a copy of the death certificate of the user;

(c) a certified copy of the letter of appointment of the executor, administrator, or personal representative or a small-estate affidavit or court order; and

(d) if requested by the custodian:

(1) a number, username, address, or other unique subscriber or account identifier assigned by the custodian to identify the user's account;

(2) evidence linking the account to the user;

(3) an affidavit stating that disclosure of the user's digital assets is reasonably necessary for administration of the estate; or

(4) a finding by the court that:

(A) the user had a specific account with the custodian, identifiable by the information specified in subparagraph (1); or

(B) disclosure of the user's digital assets is reasonably necessary for administration of the estate.

### **§ 13-A-3.3 Disclosure of content of electronic communications of principal**

To the extent a power of attorney expressly grants an agent authority over the content of electronic communications sent or received by the principal and unless directed otherwise by the principal or the court, a custodian shall disclose to the agent the content if the agent gives the custodian:

- (a) a written request for disclosure in physical or electronic form;
- (b) a copy of the power of attorney expressly granting the agent authority over the content of electronic communications of the principal;
- (c) an affidavit in which the affiant attests that the copy is an accurate copy of the original power of attorney and that, to the best of the affiant's knowledge, the power remains in effect; and
- (d) if requested by the custodian:
  - (1) a number, username, address, or other unique subscriber or account identifier assigned by the custodian to identify the principal's account; or
  - (2) evidence linking the account to the principal.

### **§ 13-A-3.4 Disclosure of other digital assets of principal**

Unless otherwise ordered by the court, directed by the principal, or provided by a power of attorney, a custodian shall disclose to an agent with specific authority over digital assets or general authority to act on behalf of a principal a catalogue of electronic communications sent or received by the principal and digital assets, other than the content of electronic communications, of the principal if the agent gives the custodian:

- (a) a written request for disclosure in physical or electronic form;
- (b) a copy of the power of attorney that gives the agent specific

authority over digital assets or general authority to act on behalf of the principal;

(c) an affidavit in which the affiant attests that the copy is an accurate copy of the original power of attorney and that, to the best of the affiant's knowledge, the power remains in effect; and

(d) if requested by the custodian:

(1) a number, username, address, or other unique subscriber or account identifier assigned by the custodian to identify the principal's account; or

(2) evidence linking the account to the principal.

### **§ 13-A-3.5 Disclosure of digital assets held in trust when trustee is original user**

Unless otherwise ordered by the court or provided in a trust, a custodian shall disclose to a trustee that is an original user of an account any digital asset of the account held in trust, including a catalogue of electronic communications of the trustee and the content of electronic communications.

### **§ 13-A-3.6 Disclosure of contents of electronic communications held in trust when trustee not original user**

Unless otherwise ordered by the court, directed by the user, or provided in a trust, a custodian shall disclose to a trustee that is not an original user of an account the content of an electronic communication sent or received by an original or successor user and carried, maintained, processed, received, or stored by the custodian in the account of the trust if the trustee gives the custodian:

(a) a written request for disclosure in physical or electronic form;

(b) a copy of the trust instrument that includes consent to disclosure of the content of electronic communications to the trustee;

(c) a certification by the trustee, under penalty of perjury, that the trust exists and the trustee is a currently acting trustee of the trust; and

(d) if requested by the custodian:

- (1) a number, username, address, or other unique subscriber or account identifier assigned by the custodian to identify the trust's account; or
- (2) evidence linking the account to the trust.

**§ 13-A-3.7 Disclosure of other digital assets held in trust when trustee not original user**

Unless otherwise ordered by the court, directed by the user, or provided in a trust, a custodian shall disclose, to a trustee that is not an original user of an account, a catalogue of electronic communications sent or received by an original or successor user and stored, carried, or maintained by the custodian in an account of the trust and any digital assets, other than the content of electronic communications, in which the trust has a right or interest if the trustee gives the custodian:

- (a) a written request for disclosure in physical or electronic form;
- (b) a copy of the trust instrument;
- (c) a certification by the trustee, under penalty of perjury, that the trust exists and the trustee is a currently acting trustee of the trust; and
- (d) if requested by the custodian:
  - (1) a number, username, address, or other unique subscriber or account identifier assigned by the custodian to identify the trust's account; or
  - (2) evidence linking the account to the trust.

**§ 13-A-3.8 Disclosure of digital assets to guardian of ward**

(a) After an opportunity for a hearing concerning the appointment or authority of a guardian, the court may grant a guardian access to the digital assets of a ward.

(b) Unless otherwise ordered by the court or directed by the user, a custodian shall disclose to a guardian the catalogue of electronic communications sent or received by a ward and any digital assets, other than the content of electronic communications, in which the ward has a right or interest if the ward gives the custodian:

- (1) a written request for disclosure in physical or electronic form;
- (2) a certified copy of the court order that gives the guardian authority over the digital assets of the ward; and
- (3) if requested by the custodian:
  - (A) a number, username, address, or other unique subscriber or account identifier assigned by the custodian to identify the account of the ward; or
  - (B) evidence linking the account to the ward.
- (c) A guardian with general authority to manage the assets of a ward may request a custodian of the digital assets of the ward to suspend or terminate an account of the ward for good cause. A request made under this section must be accompanied by a certified copy of the court order giving the guardian authority over the ward's property.

#### **PART 4. FIDUCIARY DUTY AND AUTHORITY, COMPLIANCE AND IMMUNITY**

##### **§ 13-A-4.1 Fiduciary duty and authority**

- (a) The legal duties imposed on a fiduciary charged with managing tangible property apply to the management of digital assets, including:
  - (1) the duty of care;
  - (2) the duty of loyalty; and
  - (3) the duty of confidentiality.
- (b) A fiduciary's or designated recipient's authority with respect to a digital asset of a user:
  - (1) except as otherwise provided in section 13-A-2.2, is subject to the applicable terms of service;
  - (2) is subject to other applicable law, including copyright law;
  - (3) in the case of a fiduciary, is limited by the scope of the fiduciary's duties; and
  - (4) may not be used to impersonate the user.
- (c) A fiduciary with authority over the property of a decedent, ward, principal, or settlor has the right to access any digital asset in which the decedent, ward, principal, or settlor had a right or interest and that is not held by a custodian or subject to a terms-of-service agreement.

(d) A fiduciary acting within the scope of the fiduciary's duties is an authorized user of the property of the decedent, ward, principal, or settlor for the purpose of applicable computer-fraud and unauthorized-computer-access laws, including this state's law on unauthorized computer access.

(e) A fiduciary with authority over the tangible, personal property of a decedent, ward, principal, or settlor;

(1) has the right to access the property and any digital asset stored in it; and

(2) is an authorized user for the purpose of computer-fraud and unauthorized-computer-access laws, including this state's law on unauthorized computer access.

(f) A custodian may disclose information in an account to a fiduciary of the user when the information is required to terminate an account used to access digital assets licensed to the user.

(g) A fiduciary of a user may request a custodian to terminate the user's account. A request for termination must be in writing, in either physical or electronic form, and accompanied by:

(1) if the user is deceased, a copy of the death certificate of the user;

(2) a certified copy of the letter of appointment of the executor, administrator, or personal representative or a small-estate affidavit or court order, power of attorney, or trust giving the fiduciary authority over the account; and

(3) if requested by the custodian:

(A) a number, username, address, or other unique subscriber or account identifier assigned by the custodian to identify the user's account;

(B) evidence linking the account to the user; or

(C) a finding by the court that the user had a specific account with the custodian, identifiable by the information specified in item (A).

#### **§ 13-A-4.2 Custodian compliance and immunity**

(a) Not later than sixty days after receipt of the information required under sections 13-A-3.1 through 13-A-4.1, a custodian shall comply with a request under this article from a fiduciary or designated recipient to disclose digital assets or terminate an account. If the

custodian fails to comply, the fiduciary or designated recipient may apply to the court for an order directing compliance.

(b) An order under paragraph (a) directing compliance must contain a finding that compliance is not in violation of 18 U.S.C. section 2702, as amended.

(c) A custodian may notify the user that a request for disclosure or to terminate an account was made under this article.

(d) A custodian may deny a request under this article from a fiduciary or designated recipient for disclosure of digital assets or to terminate an account if the custodian is aware of any lawful access to the account following the receipt of the fiduciary's request.

(e) This article does not limit a custodian's ability to obtain or require a fiduciary or designated recipient requesting disclosure or termination under this article to obtain a court order which:

- (1) specifies that an account belongs to the ward or principal;
- (2) specifies that there is sufficient consent from the ward or principal to support the requested disclosure; and
- (3) contains a finding required by law other than this article.

(f) A custodian and its officers, employees, and agents are immune from liability for an act or omission done in good faith in compliance with this article.

## **PART 5. MISCELLANEOUS PROVISIONS**

### **§ 13-A-5.1 Relation to electronic signature in global and national commerce act**

This article modifies, limits, or supersedes the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. section 7001 et seq., but does not modify, limit, or supersede section 101(c) of such act, 15 U.S.C. section 7001(c), or authorize electronic delivery of any of the notices described in section 103(b) of such act, 15 U.S.C. section 7003(b).

## **§ 13-A-5.2 Severability**

If any provision of this article or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this article which can be given effect without the invalid provision or application, and to this end the provisions of this article are severable.

## **ARTICLE 14**

### **REPEALER; DERIVATION AND DISTRIBUTION TABLES; EFFECTIVE DATE**

#### **PART 1. LAWS REPEALED BY THIS CHAPTER**

### **§ 14-1.1 Schedule of laws repealed; effect of repeal**

(a) The following are the laws repealed in their entirety, except as specifically noted:

Decedent Estate Law..... All

General Obligations Law.... Article 5, section 5-701, subdivisions 4,  
7 and 8

Personal Property Law..... Article 2 -- All  
Article 2-A -- All  
Article 3 -- sections 32, 32-a and 36  
Article 8-A -- All  
Article 10-A -- All

Real Property Law..... Article 3 -- All  
Article 4 -- All, except sections 119, 120,  
120-a, 121, 122, 122-a, 123  
Article 5 -- All

(b) Notwithstanding the repeal of the laws prescribed by paragraph (a):

(1) Whenever any repealed statute, that has, in substance, been carried over into this chapter, contained a provision which made such statute, or a provision thereof, inapplicable to the estates of persons dying, or to instruments executed, prior to its effective date, such

applicability provision is incorporated into this chapter and made part of the specified section thereof to which it relates, as if expressly included therein, to wit:

(A) Decedent Estate Law

|                                                                                                                                                                                                                                                                                                           |                    |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------|
| (i) Section 26 -- as set forth in Laws of 1955, c.225, §2 .....                                                                                                                                                                                                                                           | 11-1.1 (b) (5) (F) |
| (ii) Section 28 -- as set forth in Laws of 1931, c.562, §10 .....                                                                                                                                                                                                                                         | 5-3.4              |
| (iii) Section 35 -- as set forth in Laws of 1931, c.562, §10 .....                                                                                                                                                                                                                                        | 5-1.3              |
| (iv) Section 36 -- to the extent that it was made applicable only to wills of persons adjudicated incompetent on or after March 1, 1965 .....                                                                                                                                                             | 3-4.4              |
| (v) Section 46 -- as set forth in Laws of 1931, c.562, §10 .....                                                                                                                                                                                                                                          | 3-3.8              |
| (vi) Section 47-a -- to the extent that it was made applicable only to wills of persons dying after April 30, 1921 .....                                                                                                                                                                                  | 2-1.2              |
| (vii) Section 47-b -- to the extent that it was made applicable only to wills of persons dying after May 12, 1936 .....                                                                                                                                                                                   | 3-3.9              |
| (viii) Section 47-c -- to the extent that it has been judicially construed to apply only to wills and inter vivos instruments executed after March 28, 1938 .....                                                                                                                                         | 2-1.1              |
| (ix) Section 47-d -- to the extent that it was made applicable only to wills executed after August 31, 1947 .....                                                                                                                                                                                         | 13-1.3(a) (2)      |
| (x) Subdivision 7 of section 47-e .....                                                                                                                                                                                                                                                                   | 3-1.3(b)           |
| (xi) Section 47-g -- to the extent that it was made applicable only to wills of persons living on or born subsequent to June 1, 1966 ....                                                                                                                                                                 | 3-3.7              |
| (xii) Section 49 -- to the extent that it was made applicable only to wills of persons dying, or inter vivos instruments executed, on or after March 1, 1964, and to inter vivos instruments executed prior to such date which are, on such date, subject to the creator's power to revoke or amend ..... | 2-1.3              |
| (xiii) Section 83 -- as set forth in the Laws of 1959, c.689 and the Laws of 1963, c.712, §2 .....                                                                                                                                                                                                        | 4-1.1              |
| (xiv) Section 83-a -- to the extent that it was made applicable to the estates of persons dying on or after March 1, 1964 .....                                                                                                                                                                           | 4-1.2              |
| (xv) Subdivision 6 of section 89 .....                                                                                                                                                                                                                                                                    | 2-1.6              |
| (xvi) Subdivision 8 of section 124 .....                                                                                                                                                                                                                                                                  | 2-1.8              |

(xvii) Section 125 -- to the extent that it was made applicable only to wills of persons dying after May 2, 1936; and  
as affected by the Laws of 1966, c. 16, §2, which removed the limitation that the testator could not authorize a fiduciary to name a successor to serve without a bond, and made such change effective on March 8, 1966 and applicable to letters issued after such date to executors and testamentary trustees qualifying under wills of decedents dying after May second, nineteen hundred thirty-six ...  
11-1.7

(B) Personal Property Law

|                                                                                              |              |
|----------------------------------------------------------------------------------------------|--------------|
| (i) Section 11 -- as set forth in Laws of 1960, c.448, §4 .....                              | 9-1.1        |
| (ii) Section 11-a -- as set forth in Laws of 1960, c.452, §5 ...                             | 9-1.2        |
| (iii) Section 11-b -- as set forth in Laws of 1960, c.452, §5 .....                          | 9-1.3        |
| .....                                                                                        | 9-1.3        |
| (iv) Section 12 -- as set forth in Laws of 1953, c.715, §3 and Laws of 1961, c.866, §7 ..... | 8-1.1        |
| (v) Section 13-e -- as set forth in Laws of 1965, c.401, §2 ....                             | 9-1.8        |
| (vi) Subdivision 2 of section 15 .....                                                       | 7-1.5        |
| (vii) Section 16 -- as set forth in Laws of 1961, c.866, §7 ....                             | 9-2.1        |
| (viii) Section 16-a -- as set forth in Laws of 1961, c.866, §7 .....                         | 8-1.7        |
| .....                                                                                        | 8-1.7        |
| (ix) Section 17 -- as set forth in Laws of 1959, c.453, §4 .....                             | 9-2.2        |
| (x) Section 21 -- as set forth in Laws of 1965, c.824 .....                                  | 11-2.2(a)(7) |
| .....                                                                                        | 11-2.2(a)(7) |

(C) Real Property Law

|                                                                                                                                    |          |
|------------------------------------------------------------------------------------------------------------------------------------|----------|
| (i) Section 42 -- as set forth in Laws of 1958, c.153, §2, as amended by Laws of 1959, c.456, §3 and Laws of 1960, c.448, §4 ..... | 9-1.1(a) |
| (ii) Section 42-b -- as set forth in Laws of 1960, c.452, §5 ...                                                                   | 9-1.2    |
| (iii) Section 42-c -- as set forth in Laws of 1960, c.452, §5 .....                                                                | 9-1.3    |
| .....                                                                                                                              | 9-1.3    |
| (iv) Section 59 -- as set forth in Laws of 1962, c.146, §3 .....                                                                   | 6-5.1    |
| (v) Section 61 -- as set forth in Laws of 1959, c.454, §4 and Laws of 1961, c.866, §7 .....                                        | 9-2.1    |
| (vi) Section 61-a -- as set forth in Laws of 1959, c.454, §4 and Laws of 1961, c.866, §7 .....                                     | 8-1.7    |
| (vii) Section 62 -- as set forth in Laws of 1959, c.454, §4 ....                                                                   | 9-2.2    |
| (viii) Section 110 -- as set forth in Laws of 1953, c.131, §2 .....                                                                |          |

..... 7-1.8  
 (ix) Section 113 -- as set forth in Laws of 1953, c.715, §3 and Laws of 1961, c.866, §7 ..... 8-1.1

(2) Any repealed statute shall continue to apply to any instrument to which it would have applied had it not been repealed, whenever, under 1-1.5, such instrument is not subject to the provisions of this chapter either because its creator was not living on the effective date of this chapter or because rights accrued under such instrument which cannot be impaired or defeated by this chapter.

(3) A reference in any statute of this state to any repealed law or a provision thereof shall be treated as a reference to the corresponding statute or a provision thereof, if any, of this chapter.

## **PART 2. DERIVATION AND DISTRIBUTION TABLES**

### **§ 14-2.1 Derivation of the estates, powers and trusts law from other laws**

| EPTL   | DEL         | GEN OB | PPL   | RPL | SCA |
|--------|-------------|--------|-------|-----|-----|
| 1-1.1  |             |        |       |     |     |
| 1-1.2  |             |        |       |     |     |
| 1-1.3  |             |        |       |     |     |
| 1-1.4  |             |        | 270-a |     |     |
| 1-1.5  |             |        |       |     |     |
| 1-2.1  |             |        |       |     |     |
| 1-2.2  |             |        |       |     |     |
| 1-2.3  |             |        |       |     |     |
| 1-2.4  |             |        |       |     |     |
| 1-2.5  | 81, 134     |        |       |     |     |
| 1-2.6  |             |        |       |     |     |
| 1-2.7  |             |        |       |     |     |
| 1-2.8  |             |        |       |     |     |
| 1-2.9  |             |        |       |     |     |
| 1-2.10 |             |        |       |     |     |
| 1-2.11 | 47-a, 83(9) |        |       |     |     |
| 1-2.12 |             |        |       |     |     |

|        |                     |        |
|--------|---------------------|--------|
| 1-2.13 |                     |        |
| 1-2.14 | 47-a, 83(10)        |        |
| 1-2.15 |                     |        |
| 1-2.16 |                     |        |
| 1-2.17 |                     |        |
| 1-2.19 | 2                   |        |
| 2-1.1  | 47-c                |        |
| 2-1.2  | 47-a                |        |
| 2-1.3  | 49                  |        |
| 2-1.4  |                     | 240(1) |
| 2-1.5  | 85, 86              |        |
| 2-1.6  | 89                  |        |
| 2-1.7  | 80-a                |        |
| 2-1.8  | 124                 |        |
| 2-1.9  |                     | 17-f   |
| 3-1.1  | 15                  |        |
| 3-1.2  | 11                  |        |
| 3-1.3  | 12, 47-e            |        |
| 3-2.1  | 21, 22              |        |
| 3-2.2  | 16                  |        |
| 3-3.1  | 14                  |        |
| 3-3.2  | 27                  |        |
| 3-3.3  | 29                  |        |
| 3-3.4  |                     |        |
| 3-3.5  | 126                 |        |
| 3-3.6  | 20, 38              |        |
| 3-3.7  | 47-g                |        |
| 3-3.8  | 46                  |        |
| 3-3.9  | 47-b                |        |
| 3-4.1  | 34                  |        |
| 3-4.2  | 37                  |        |
| 3-4.3  | 39, 40              |        |
| 3-4.4  | 36                  |        |
| 3-4.5  | 20                  |        |
| 3-4.6  | 41                  |        |
| 3-5.1  | 22-a, 23,<br>24, 47 |        |

|        |             |      |
|--------|-------------|------|
| 4-1.1  | 83          |      |
| 4-1.2  | 83-a        |      |
| 4-1.3  | 87-a        |      |
| 4-1.4  | 87          |      |
| 5-1.1  | 18, 18-a, b |      |
| 5-1.2  | 50, 87      |      |
| 5-1.3  | 35          |      |
| 5-1.4  |             |      |
| 5-3.1  |             | 200  |
| 5-3.2  | 26          |      |
| 5-3.3  | 17          |      |
| 5-3.4  | 28          |      |
| 5-4.1  | 130         |      |
| 5-4.2  | 131         |      |
| 5-4.3  | 132         |      |
| 5-4.4  | 133         |      |
| 5-4.5  | 135         |      |
| 6-1.1  |             | 30   |
| 6-1.2  |             | 32   |
| 6-1.3  |             | 34   |
| 6-2.1  |             | 65   |
| 6-2.2  | 84          | 66   |
| 6-3.1  |             | 35   |
| 6-3.2  |             | 36   |
| 6-3.3  |             | 50   |
| 6-3.4  |             | 64   |
| 6-4.1  |             | 35   |
| 6-4.2  |             | 37   |
| 6-4.3  |             | 38   |
| 6-4.4  |             | 39   |
| 6-4.5  |             | 59-a |
| 6-4.6  |             | 50-b |
| 6-4.7  |             | 40   |
| 6-4.8  |             | 40-a |
| 6-4.9  |             | 40-b |
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### **PART 3. EFFECTIVE DATE**

#### **§ 14-3.1 When act becomes effective**

This act shall take effect September first, nineteen hundred sixty-seven.