

Table of Contents

Acknowledgments	v
About the Authors	vii
Table of Chapters	ix

VOLUME 1

Chapter 1 **Introductory Matters**

§ 1:1	Introduction	1-1
§ 1:2	Scope of Discussion and Forms	1-2
§ 1:2.1	Uniform Trust Code	1-3
Table 1-1	Comparison of New York Law and the UTC.....	1-4
§ 1:2.2	Uniform Probate Code.....	1-6
Table 1-2	Comparison of New York Law and the UPC	1-7
§ 1:3	Importance of Statutory History.....	1-11
§ 1:4	The Drafter’s Objectives	1-12
§ 1:4.1	Styles of Drafting	1-13
§ 1:4.2	The Importance of Grammar and Precision of Language.....	1-15

Chapter 2 **Pre-Drafting Considerations and Restrictions**

§ 2:1	Will or Trust?.....	2-3
§ 2:1.1	Considerations Regarding the Use of a Will.....	2-3
[A]	Potential Disadvantages Associated with the Use of a Will.....	2-4
[B]	Other Functions of a Will	2-5
[C]	Use of Different Wills for Different Jurisdictions.....	2-6
§ 2:1.2	Considerations Regarding the Use of a Revocable Trust.....	2-6
[A]	Avoiding Probate.....	2-7
[B]	Privacy Concerns	2-8
[C]	Unknown Heirs	2-9
[D]	Taxes.....	2-9

	[E]	Management Vehicle/Planning for Incapacity	2-10
	[F]	Flexibility.....	2-12
	[G]	Record-Keeping Considerations	2-13
§ 2:1.3		Other Procedural and Dispositive Differences Between Trusts and Wills.....	2-13
§ 2:2		Legal Restrictions on Wills and Trusts	2-14
§ 2:2.1		Capacity and Minimum Age Required for Making a Will or Trust.....	2-14
§ 2:2.2		Property Not Disposable by Will or Trust.....	2-15
§ 2:2.3		Contract to Make a Will or Trust	2-16
§ 2:3		Marriage and the Rights of the Surviving Spouse.....	2-17
§ 2:3.1		Traditional Marriages.....	2-17
§ 2:3.2		Nontraditional Marriages.....	2-19
	[A]	Federal and State Same-Sex Marriage Considerations	2-20
	[A][1]	New York Approach to Same-Sex Marriage	2-21
	[B]	Drafting Suggestions.....	2-22
§ 2:3.3		Right of Election of Surviving Spouse.....	2-23
	[A]	New York Model	2-23
	[B]	Testamentary Substitutes.....	2-26
	[B][1]	Life Insurance As a Testamentary Substitute for New York Elective Share Purposes.....	2-27
	[B][2]	Retirement Plans and Options As Testamentary Substitutes	2-29
	[C]	Further Regarding the Elective Share— Calculation	2-30
	[D]	Effect of Real Property Situs on Elective Share	2-32
	[E]	Waiver or Loss of Elective Share (New York Model)	2-32
	[F]	Impact of the Elective Share.....	2-35
	[G]	Barring Elective Share, Dower, and Other Rights	2-37
	[H]	Preserving Bequests Despite an Election Against the Will.....	2-37
	[I]	Elective Share Under the Uniform Probate Code	2-38
	[I][1]	1969 UPC	2-38
	[I][2]	1990 UPC: Radical Reform	2-39
	[I][3]	2008 UPC Amendments: Change in Form.....	2-41
§ 2:3.4		Impact of Applicable Marital Regime	2-41
§ 2:4		Rights of Children	2-42
§ 2:4.1		Forced Heirs.....	2-43
§ 2:4.2		After-Born Children or Pretermitted Children	2-44

Table of Contents

§ 2:4.3	Reproduction Technologies	2-46
[A]	Posthumously Conceived Children	2-47
[B]	The UPC’s Approach.....	2-52
§ 2:4.4	Adopted Children.....	2-54
[A]	New York Pre-1964 Precautionary Addendum	2-54
[B]	Post-1964 New York Law.....	2-56
[C]	Other States.....	2-56
[D]	Choosing to Exclude Adopted Children	2-56
[E]	Inheritance Rights of Adopted-Out Children	2-57
§ 2:4.5	Non-Marital Children.....	2-58
[A]	The Evolving Treatment of Non-Marital Children	2-59
[B]	New York Definition of Paternity.....	2-60
[C]	Presumption of Inclusion.....	2-62
[D]	Drafting Solutions	2-63
[E]	Choice of Law	2-64
§ 2:4.6	Disinheriting Children.....	2-64
§ 2:5	Need for a Comprehensive Estate Plan	2-65
§ 2:5.1	Life Insurance	2-65
§ 2:5.2	Pension, Profit Sharing, Retirement and Other Benefits.....	2-66
§ 2:5.3	Family Residence	2-66
§ 2:5.4	Lifetime Trusts and Gifts	2-66
§ 2:5.5	Statutory Rights.....	2-67
§ 2:5.6	Taxes.....	2-68

Chapter 3 Introductory Clauses

§ 3:1	Wills	3-1
§ 3:1.1	Name of Testator	3-2
§ 3:1.2	Recital of Residence	3-2
§ 3:1.3	Limiting the Scope of the Will Based on Situs of Property	3-3
§ 3:1.4	Statement Regarding Testamentary Capacity	3-4
§ 3:1.5	Use of a Heading or Cover Page in Lieu of or in Addition to Introductory Clause	3-4
§ 3:2	Trusts	3-5
§ 3:2.1	Trust Agreements.....	3-5
§ 3:2.2	Declarations of Trust	3-7
§ 3:3	Nomenclature—“Last Will and Testament” or “Will”?.....	3-8

Chapter 4 Legacies, Bequests, and Devises

§ 4:1 Introduction to Legacies, Bequests, and Devises 4-2

§ 4:2 Specific Legacies 4-3

 § 4:2.1 Ademption 4-4

 [A] Ademption Under the UPC 4-6

 [A][1] 1969 UPC: The Traditional Approach,
 Somewhat Liberalized 4-6

 [A][2] 1990 UPC: A Break from Tradition 4-7

 § 4:2.2 Specific Bequests to Minors 4-7

 § 4:2.3 Specific Intangible Bequests 4-8

 § 4:2.4 “Residual” Specific Bequests 4-9

 § 4:2.5 Incorporation by Reference, Separate
 Instructions, and Precatory Requests to the
 Legatee to Make Gifts 4-16

 [A] Tax Opportunities 4-17

 [B] Alternate Approach: Power of Appointment 4-18

 § 4:2.6 Encumbrances on Bequests 4-19

 § 4:2.7 Life Estate in Tangible Property 4-20

§ 4:3 General Legacies 4-21

 § 4:3.1 Interest on General Legacies 4-22

§ 4:4 Demonstrative Legacies 4-22

§ 4:5 Devises of Real Estate 4-23

 § 4:5.1 Description of Real Property 4-25

 § 4:5.2 Creation of Tenancy in Common 4-25

 § 4:5.3 Minor Devises 4-27

 § 4:5.4 Compliance with Law of Situs 4-27

 § 4:5.5 Life Estate in Real Property 4-28

 § 4:5.6 Condominiums and Cooperative Apartments 4-32

§ 4:6 Separate or Omnibus Paragraphs 4-36

§ 4:7 General Legacies, Specific Legacies, and Devises
 of Real Estate Contrasted; Effect on Post-Death
 Income and Executors’ Commissions 4-37

§ 4:8 Residuary Legacies 4-39

 § 4:8.1 Lapse of Residuary Legacies 4-42

§ 4:9 Pourover Provisions 4-45

 § 4:9.1 Reverse Pourovers 4-46

§ 4:10 Fractional Versus Pecuniary Gifts 4-47

§ 4:11 Gifts by Implication 4-49

§ 4:12 Identification of Legatees 4-51

§ 4:13 Methods of Distribution Among Linear Descendants 4-55

 § 4:13.1 “Per Stirpes” and “Per Capita” 4-55

 § 4:13.2 “By Representation” 4-58

Diagram 4-1 Distribution by Representation 4-59

Table of Contents

§ 4:14	Effect of Divorce or Other Termination of Marriage	4-60
§ 4:15	Survivorship of Legatee; Lapse	4-62
§ 4:15.1	Anti-Lapse: The UPC Approach	4-64
[A]	1969 UPC.....	4-64
[B]	1990 UPC: Traps for the Unwary	4-64
§ 4:16	Preferred Legacies	4-66
§ 4:17	Abatement of Legacies	4-67
§ 4:18	Forgiveness of Indebtedness.....	4-68
§ 4:19	Advancements	4-69
§ 4:20	Conditions on Bequests, Legacies, and Devises	4-70
§ 4:21	Disinheritance of Heirs	4-71
§ 4:22	Disclaimers and Renunciations	4-72
§ 4:23	Exercise of Powers of Appointment.....	4-73

**Chapter 5 Estate Tax and Planning for the Applicable
 Credit Amount**

§ 5:1	Introduction	5-2
§ 5:1.1	Estate Tax Exemption and Rates—A Brief History	5-3
[A]	Recapture?	5-8
§ 5:1.2	Carryover Basis.....	5-10
[A]	Applicable Property.....	5-11
[B]	Rules for Assets Passing to Surviving Spouse	5-12
[C]	Exclusion on Gains of Residences	5-12
[D]	Allocation of Basis Adjustments	5-13
§ 5:1.3	2017 Tax Bill.....	5-13
§ 5:2	Portability and Its Limitations	5-14
§ 5:3	Credits Versus Deductions.....	5-17
§ 5:4	Other Credits Against the Estate Tax.....	5-18
§ 5:4.1	State Death Taxes	5-18
§ 5:4.2	Additional Credits.....	5-21
§ 5:4.3	Former Exclusion (Then Deduction) for Portion of Family-Owned Business Repealed	5-22
§ 5:5	Drafting Approaches.....	5-22
§ 5:5.1	Rely on Portability.....	5-23
§ 5:5.2	Mandatory Credit Shelter Bequests.....	5-23
[A]	Unified Credit Formulas	5-26
[A][1]	Limitations Based on Increases in Unified Credit	5-28
[A][2]	Limitations Based on State Versus Federal Exemption.....	5-31
§ 5:5.3	Disclaimer Provisions	5-33
§ 5:5.4	“Clayton” Provisions	5-35
§ 5:5.5	“Supercharged” Credit Shelter Trusts.....	5-36

§ 5:6	Other Considerations Impacting the Credit Shelter Amount	5-38
§ 5:6.1	Reductions in the Credit Shelter Amount	5-38
§ 5:6.2	Control Premiums and Minority Discounts.....	5-40
[A]	Control Premiums and Minority Discounts— Impact on Credit Shelter Planning.....	5-42
§ 5:7	Considerations Regarding Lifetime Giving.....	5-44

Chapter 6 The Marital Deduction

§ 6:1	Marital Deduction—General Considerations	6-2
§ 6:2	Relationship Between Credit Shelter Planning and Marital Deduction Planning	6-5
§ 6:3	Limitations	6-6
§ 6:3.1	Quantitative Limitations—Current Unlimited Marital Deduction	6-6
[A]	Pre-1982 Limitations on Amount of Marital Deduction	6-6
[A][1]	1948–1976: 50% of Adjusted Gross Estate; Formulation	6-6
[A][2]	1977–1981: \$250,000 Floor; Transitional Rule	6-7
[A][3]	Formula Clauses for Maximum Marital Deduction Before Economic Recovery Tax Act of 1981 (ERTA).....	6-8
[A][4]	1982: Unlimited Marital Deduction; Transitional Rule	6-11
§ 6:3.2	Qualitative Restrictions	6-12
§ 6:4	Trusts Qualifying for Marital Deduction.....	6-13
§ 6:4.1	“Traditional” Marital Deduction Trust with General Power of Appointment.....	6-13
[A]	Powers of Appointment and Invasion	6-17
[B]	“Specific Portion”	6-18
§ 6:4.2	Estate Trust.....	6-18
§ 6:4.3	QTIP Trust	6-18
[A]	Additional QTIP Requirements	6-20
[A][1]	Distributions to Persons Other Than Surviving Spouse	6-20
[A][2]	Power to Elect QTIP Treatment.....	6-21
[A][2][a]	QTIP Election Must Reduce Estate Tax to Zero?	6-22
[A][3]	Conditional QTIP Provisions	6-23
[B]	Partial QTIP Elections and Splitting QTIPS.....	6-25
[C]	Planning Opportunity: Fractional Discount Available for QTIP and Probate Assets.....	6-26

Table of Contents

[D]	QTIP Trusts: Final-Period Income	6-27
[E]	Estate Tax on QTIP Property	6-29
[F]	Gift Tax on QTIP Property.....	6-30
§ 6:4.4	Provisions Regarding “All the Income” in QTIPs and Traditional GPA Trusts.....	6-30
§ 6:5	Marital Deduction Formula Clauses.....	6-34
§ 6:5.1	Floor and Ceiling Clauses	6-34
§ 6:5.2	Maximum-Minimum Marital Deduction Clauses.....	6-36
§ 6:5.3	Other (Simpler) Marital Deduction Formulas	6-38
§ 6:5.4	Pre-Residuary (Pecuniary) Gifts Versus Residuary (Fractional Share) Gifts.....	6-39
[A]	Leverage in Appreciation or Depreciation	6-41
[B]	Valuation Date for Pecuniary Gift	6-42
§ 6:5.5	Adjustments for Tax Elections	6-42
[A]	Impact on the Actual Size of the Marital Legacy	6-42
[B]	Impact on the Size of the Marital Deduction.....	6-43
[B][1]	Effect of Deduction for Administration Expenses—Management Expenses Versus Transmission Expenses	6-43
[B][2]	Planning and Drafting Implications	6-44
§ 6:6	Marital Trust Planning for Non-Citizen Spouses.....	6-45
§ 6:6.1	QDOT Requirements	6-45
§ 6:6.2	Sample Qualified Domestic Trust (QDOT) Language	6-48
§ 6:7	Other Marital Deduction Drafting Issues	6-52
§ 6:7.1	Interest in Unidentified Assets	6-52
§ 6:7.2	Encumbrances and Obligations.....	6-53
§ 6:7.3	Common Disaster and Simultaneous Death	6-54
§ 6:7.4	Qualifying Retirement Assets for QTIP	6-58
§ 6:7.5	Marital Deduction for Assets Passing As a Result of a Settlement.....	6-59
§ 6:7.6	Source of Payment of Estate Taxes	6-60

Chapter 7 **Generation-Skipping Transfer Tax**

§ 7:1	Introduction to the Generation-Skipping Transfer Tax.....	7-2
§ 7:1.1	Structure of the GST Tax.....	7-3
§ 7:2	Exemptions, Exceptions, and Exclusions from GST Tax	7-5
§ 7:2.1	GST Exemption	7-5
§ 7:2.2	Gift Tax Exclusions Applicable to GST Tax.....	7-7
§ 7:2.3	Predeceased Child or Collateral Relative Exception.....	7-7

§ 7:2.4	Transfers Subject to Gift or Estate Tax	7-10
§ 7:2.5	Change of Transferor; Reverse QTIP	7-11
§ 7:3	Determination and Payment of GST Tax.....	7-11
§ 7:4	Considerations Regarding Generation-Skipping Trusts.....	7-14
§ 7:4.1	Grandfathered Trusts	7-14
§ 7:4.2	ETIP Period.....	7-16
§ 7:4.3	Splitting Trusts	7-16
§ 7:4.4	“Reverse” QTIP Election	7-22
[A]	Reverse QTIP Election for QDOT	7-23
[B]	Constructive Addition Issues	7-23
[B][1]	Possible Solutions.....	7-25
§ 7:4.5	Granting General Power of Appointment.....	7-27
[A]	Require Consent	7-30
[B]	Limit Appointees to Creditors	7-30
[C]	Include Self-Destruct Clause	7-31
[D]	Trim the Scope of the Power	7-31
[E]	Payment of Taxes on Power, Default Provisions, and Coordinating Formulae	7-32
§ 7:4.6	Dynasty Trusts.....	7-34
[A]	Single Pot Versus Stirpital Shares.....	7-34
[A][1]	Single Pot Approach	7-34
[A][2]	Stirpital Shares at Each Generation.....	7-34
[A][3]	Comparison of the Two Approaches.....	7-37
[B]	Perpetual Term Dynasty Trusts.....	7-38
[B][1]	Drafting Flexibility	7-39
[C]	Other Dynasty Trust Drafting Matters	7-40
[C][1]	Statement of Intention to Create Perpetual Trust	7-40
[C][2]	Trustee Appointment Provisions	7-41
[C][3]	Back-Up Perpetuities Provision	7-43
§ 7:5	State GST Tax Considerations.....	7-44

Chapter 8 Charitable Bequests

§ 8:1	Charitable Legacies and Devises	8-2
§ 8:2	Limitations on Charitable Gifts.....	8-4
§ 8:3	Tax Aspects of Charitable Gifts	8-4
§ 8:4	Charitable Split-Interest Trusts.....	8-8
§ 8:4.1	Charitable Remainder Trusts	8-8
[A]	Tax Benefits	8-9
[B]	Trust Language and Operation of CRT.....	8-10
[C]	Power to Amend; Statement of Intent.....	8-11
[D]	Selection of Trustee, Limitation on Powers	8-12

Table of Contents

[E]	Payments to Non-Charitable Beneficiaries.....	8-12
[E][1]	Amount.....	8-12
[E][2]	Adjustments.....	8-13
[E][3]	Accelerated CRTs.....	8-13
[E][4]	“Exhaustion” Concerns for Charitable Remainder Annuity Trusts	8-14
[E][5]	Trusts for Financially Disabled Beneficiary As the Current Beneficiary	8-15
[F]	Interest of Successive Beneficiary: Power to Revoke, Estate Tax Concerns	8-15
[G]	Designation of Charitable Recipients.....	8-16
[H]	Net Income Unitrusts.....	8-18
[I]	Flip Unitrusts	8-20
[J]	Right of Election Complications for CRTs.....	8-21
§ 8:4.2	Charitable Lead Trusts	8-22
[A]	Avoiding Estate Tax Inclusion.....	8-25
[B]	Generation-Skipping Opportunities	8-26
[C]	Impact of Grantor Trust Status.....	8-26
[D]	Private Foundation As Lead Beneficiary	8-29
[E]	Income Tax Planning—Ordering of Income	8-29
[F]	Additional Drafting Considerations	8-29
§ 8:5	Reformation and Amendment of Charitable Trusts	8-31
§ 8:6	Private Charitable Foundations.....	8-32
§ 8:7	Donor Advised Funds	8-34
§ 8:8	Community Foundations	8-34
§ 8:9	Charitable Limited Liability Companies.....	8-35

Chapter 9 Apportionment of Taxes, Debts, and Expenses

§ 9:1	Introduction	9-1
§ 9:2	Paying Taxes Imposed on Probate Estate or Taxable Estate.....	9-2
§ 9:2.1	Effect of Lifetime Gifts.....	9-4
[A]	Use of Applicable Exclusion Amount.....	9-5
[B]	Gift Tax Paid or Payable	9-5
§ 9:3	Interrelation of Tax Clauses in Will and Inter Vivos Trust.....	9-8
§ 9:4	Allocation of GST Tax	9-9
§ 9:5	Allocation of State Taxes.....	9-10
§ 9:6	Estate Tax on Qualified Terminable Interest Property.....	9-11
§ 9:6.1	Direction in First Testator’s Will or Trust.....	9-13
§ 9:6.2	Provision in Surviving Spouse’s Will or Trust and Protective Statutes.....	9-14
§ 9:6.3	Right of Recovery from QTIP.....	9-14

§ 9:7	Allocation of Tax on Life Insurance and Other Non-Probate Assets	9-15
§ 9:8	Allocation within Residuary Estate	9-17
§ 9:9	Allocation of Taxes Attributable to Tax-Preferred Assets	9-18
§ 9:10	Allocation of Debts and Expenses	9-19
§ 9:11	Composite Model	9-19

**Chapter 10 Additional Considerations Regarding
Drafting Trusts**

§ 10:1	Introduction	10-3
§ 10:2	Administration and Distributions During Grantor’s Life	10-3
§ 10:2.1	Effect of Grantor’s Incapacity	10-3
§ 10:3	Recitation Regarding Revocability of Trust	10-4
§ 10:4	Trust Distributions	10-5
§ 10:4.1	Current Interests	10-5
[A]	Traditional (and Related) Approaches.....	10-6
[A][1]	Mandatory Distributions.....	10-7
[A][2]	Discretionary Distributions.....	10-8
[B]	Annuity Trusts and Unitrusts—Overview	10-16
[B][1]	Annuity Trusts	10-17
[B][2]	Statutory Unitrusts	10-19
[B][3]	Sample Unitrust Provision	10-19
[C]	Limitations on Accumulations of Income.....	10-20
[D]	Application of Income and/or Principal.....	10-20
[D][1]	Facilitating the Application of Income and/or Principal	10-21
§ 10:4.2	Remainder Interests	10-22
[A]	Vested Remainders Versus Contingent Remainders—The Basic Distinction	10-22
[B]	Remainder to a Class; Importance of Survivorship Language.....	10-24
[C]	Future Interests in Trust	10-25
[D]	Continuing Trusts	10-26
§ 10:4.3	Provisions Relating to Trusts Holding Retirement Plans	10-27
[A]	Designated Beneficiaries, Eligible Designated Beneficiaries and Non-Designated Beneficiaries and the Related RMD Rules.....	10-28
[B]	See-Through Trusts.....	10-29
§ 10:4.4	Precatory Language	10-30

Table of Contents

§ 10:5	Spendthrift Provisions	10-31
§ 10:5.1	The Uniform Trust Code (UTC) Approach.....	10-35
§ 10:6	Powers of Appointment	10-37
§ 10:6.1	Tax Considerations in Creating Powers of Appointment	10-39
[A]	General Powers of Appointment	10-39
[B]	Non-General, Special, or Limited Powers of Appointment	10-41
[B][1]	Powers of Withdrawal; “5 and 5” Powers.....	10-42
[B][2]	Ascertainable Standards	10-43
§ 10:6.2	Power to Appoint in Further Trust	10-46
§ 10:6.3	Sample Language Creating Powers of Appointment	10-46
§ 10:6.4	Considerations Applicable to the Exercise of Powers of Appointment.....	10-47
[A]	Compliance with Conditions.....	10-48
[B]	Compliance with the RAP	10-49
§ 10:6.5	General Powers of Appointment and GST Planning.....	10-50
§ 10:7	Classification As a Domestic Trust or a Foreign Trust	10-51
§ 10:8	Changing Trust Situs.....	10-55
§ 10:9	Rule Against Perpetuities (RAP).....	10-57
§ 10:9.1	The Traditional Rule Against Perpetuities: Measuring Lives.....	10-59
§ 10:9.2	Diagram Illustrating Dispositions in Trust Under RAP	10-60
§ 10:9.3	Drafting Mistakes to Avoid Under the Traditional RAP	10-61
[A]	Traditional RAP Trap: Unborn Widow	10-61
[B]	Traditional RAP Trap: Administrative Contingencies.....	10-62
§ 10:9.4	Wait-and-See and Cy Pres	10-62
§ 10:9.5	Uniform Statutory Rule Against Perpetuities (USRAP)	10-63
§ 10:9.6	Interests Subject to RAP	10-63
[A]	Exclusion of Future Interests Retained by Creator; Future Interests Created in Charities	10-64
[B]	Inapplicability to Powers in Trust	10-64
§ 10:9.7	Savings Clauses	10-64
§ 10:9.8	Rule Against Suspension of Power of Alienation Distinguished	10-65
§ 10:9.9	Choice of Law	10-66
§ 10:9.10	Exercise of a Power of Appointment.....	10-66

§ 10:9.11	The Rule Against Perpetuities in New York	10-68
[A]	Prior Law	10-68
[B]	Current Law	10-69
§ 10:10	Income Tax Planning and Other Considerations	10-69
§ 10:11	Trusts to Hold Stock in S Corporations	10-71
§ 10:11.1	Qualified Subchapter S Trusts (QSSTs)	10-72
[A]	The Single Current Beneficiary Requirement.....	10-73
[B]	The Trust Termination Requirements.....	10-74
[C]	The Requirement to Distribute All of the Trust Income	10-74
[D]	Income Taxation of QSSTs.....	10-74
§ 10:11.2	Electing Small Business Trusts (ESBTs).....	10-75
§ 10:11.3	S Stock and Foreign Trusts, Grantors, and Beneficiaries.....	10-77
§ 10:12	Support Trusts and Governmental Programs	10-78
§ 10:12.1	New York Supplemental Needs Trusts	10-81
§ 10:13	Silent Trusts	10-84
§ 10:14	Trusts for Pets and Other Related Provisions	10-88
§ 10:14.1	New York Statute on Trusts for Pets.....	10-92

Chapter 11 Fiduciaries and Administrative Powers

§ 11:1	Fiduciary and Other Appointments	11-3
§ 11:1.1	Selection of Trustees and Executors	11-4
[A]	Corporate Fiduciaries.....	11-5
§ 11:1.2	Formal Qualifications	11-5
§ 11:1.3	Designation of Successor Fiduciaries; Additional Fiduciaries	11-7
§ 11:1.4	Resignation and Removal.....	11-11
[A]	The Uniform Trust Code (UTC) Approach.....	11-13
[B]	Limits on Appointment of Successor to Removed Fiduciary	11-14
[C]	Situs of Fiduciary	11-16
§ 11:1.5	Appointing Protectors	11-17
[A]	Protector Powers and Responsibilities	11-17
§ 11:1.6	Appointment of Guardians	11-19
§ 11:1.7	Directed Trustees	11-21
[A]	Administrative Trustee Sample Language	11-23
[B]	Investment Trustee Sample Language.....	11-25
[C]	Distribution Trustee Sample Language	11-29
§ 11:2	Bond	11-31
§ 11:3	Commissions	11-32
§ 11:3.1	Commissions of More Than Two Fiduciaries	11-35
[A]	Drafting Under the Multiple Commissions Statute	11-36

Table of Contents

§ 11:3.2	Commissions of Corporate Fiduciaries	11-37
[A]	New York SCPA Section 2312: Commissions of Corporate Trustees.....	11-37
[B]	New York SCPA Section 2307: Commissions of Corporate Executors	11-38
[C]	Clauses Regarding Compensation of Corporate Fiduciaries.....	11-39
§ 11:3.3	Attorney-Fiduciaries.....	11-40
[A]	Commissions for Attorney-Executor and Employees of Attorney.....	11-41
[A][1]	Execution Formalities for Disclosure Agreements	11-44
[A][2]	When a Disclosure Agreement Is Not Required.....	11-46
§ 11:3.4	“Reasonable Compensation” for Individual Fiduciaries	11-49
§ 11:4	Unanimous or Nonunanimous Decisions and Acts.....	11-49
§ 11:5	Administrative Powers of Executors and Trustees.....	11-51
§ 11:5.1	Introductory Clause	11-53
§ 11:5.2	Retention of Assets	11-55
§ 11:5.3	Investment.....	11-57
[A]	Unconventional Investments.....	11-57
[B]	Non-Income-Producing Assets in a Marital Trust	11-58
[C]	Giving Certain Powers Only to Certain Fiduciaries	11-58
§ 11:5.4	Allowing Corporate Fiduciaries to Invest in Their Own Funds.....	11-59
§ 11:5.5	Lending.....	11-59
§ 11:5.6	Sale	11-60
§ 11:5.7	Mortgage, Lease, Repairs.....	11-60
§ 11:5.8	Borrowing	11-62
§ 11:5.9	Renewing Obligations; Settling and Arbitrating Claims	11-62
§ 11:5.10	Voting Rights, Reorganizations	11-63
§ 11:5.11	Distribution in Kind	11-64
§ 11:5.12	Dividends	11-65
§ 11:5.13	Amortization	11-65
§ 11:5.14	Consolidated Investments (or Holding Assets <i>In Solido</i>).....	11-66
§ 11:5.15	Services of Others	11-67
[A]	Income Tax Deductibility of Expenses	11-69
[B]	Additional Considerations Regarding Payment of Legal Fees.....	11-71

§ 11:5.16	Accumulations, Powers in Trust	11-72
§ 11:5.17	Authority After Trusts Terminate.....	11-72
§ 11:5.18	Simplified Administrative Provisions.....	11-72
§ 11:6	Power to Make Tax Elections	11-73
§ 11:7	Powers Related to Digital Assets.....	11-75
§ 11:7.1	Pending Model Rules	11-78
§ 11:8	Investment Standards for Fiduciaries.....	11-78
§ 11:8.1	Evolution of Trustee Investment Standard Through 1970.....	11-78
§ 11:8.2	Prudent Person Rule (1970 Through 1992).....	11-79
§ 11:8.3	Uniform Prudent Investor Act (UPIA)—1992 to Date.....	11-80
[A]	Standard of Conduct.....	11-81
[B]	Specific Fiduciary Duties	11-84
[C]	Invasions; Income and Principal and the Power to Adjust	11-87
[D]	Annuities and Unitrusts.....	11-88
[E]	The Fiduciary's Duty to Diversify Assets.....	11-92
[E][1]	The Balance Between the Duty to Diversify and the Wishes of the Testator or Settlor.....	11-93
[E][2]	Diversification and Market Pressures	11-96
[E][3]	Diversification and Hindsight Liability	11-98
[E][4]	Circumventing Diversification Requirements	11-99
[F]	Retention of Initial Portfolio	11-102
[G]	Additional Powers Under the UPIA	11-103
[H]	Delegation of Investment and Management Functions.....	11-104
[I]	Considerations Regarding Waiver of Prudent Person Rule/UPIA and Allowance of Self-Dealing	11-107
§ 11:8.4	The Final "Income" Tax Regulations and Total Return Legislation.....	11-109
[A]	The Tax Questions the Income Regulations Were Intended to Address	11-109
[B]	The Effective Dates for the Income Regulations	11-110
[C]	How the Income Regulations Address the Tax Issues	11-110
[C][1]	Definition of "Income".....	11-111
[C][2]	Mandatory Versus Permissive Statutes.....	11-112
[C][3]	Capital Gains and Distributable Net Income	11-112
[C][4]	Marital Deduction Trusts.....	11-113

Table of Contents

[C][5]	Grandfathered GST Tax-Exempt Trusts	11-114
[C][6]	Charitable Remainder Trusts.....	11-114
[C][7]	Pooled Income Funds	11-115
[D]	Open Issues	11-116
§ 11:8.5	Taxation of Net Investment Income Under the Health Care and Education Reconciliation Act.....	11-116
§ 11:9	Granting Trustees Limited Powers of Amendment	11-117
§ 11:10	Special Provisions Applicable to Closely Held Businesses.....	11-118
§ 11:11	Savings Clauses—Limitations on Fiduciary Powers.....	11-121
§ 11:12	Duties of Executors and Trustees.....	11-122
§ 11:13	Fiduciary Liability and Exculpatory Clauses	11-124
§ 11:13.1	Exculpatory Clauses.....	11-125
§ 11:13.2	Indemnification	11-127
§ 11:13.3	Duty to Inform	11-128
[A]	The UTC Approach.....	11-129
§ 11:13.4	Obligation to Account.....	11-131
§ 11:13.5	Liability of Successor Fiduciaries.....	11-132

VOLUME 2

Table of Chapters	v
--------------------------------	---

Chapter 12 Other Administrative Clauses

§ 12:1	Common Disaster or Simultaneous Death.....	12-1
§ 12:2	In Terrorem Clauses	12-7
§ 12:2.1	Other Limitations on In Terrorem Clauses	12-10
§ 12:3	Arbitration and Mediation Clauses.....	12-11
§ 12:4	Transfers to Minors	12-15
§ 12:4.1	Uniform Gifts to Minors Act and Uniform Transfers to Minors Act	12-15
[A]	Age at Which Custodianship Terminates.....	12-16
[B]	Territorial Application	12-17
[C]	Investment Standard.....	12-17
[D]	Tax Considerations	12-18
[E]	Compensation	12-19
§ 12:4.2	Power in Trust Distinguished from Trust.....	12-19

§ 12:5 Contingent Disposition 12-23

§ 12:6 Funeral and Burial Directions and Related
Considerations 12-24

 § 12:6.1 Funeral and Burial Directions 12-24

 § 12:6.2 Disposition of Cemetery Plots 12-25

§ 12:7 Payment of Debts and Expenses 12-25

 § 12:7.1 Debts 12-25

 § 12:7.2 Funeral Expenses 12-26

 § 12:7.3 Allocation of Expenses 12-27

§ 12:8 Definitions 12-27

§ 12:9 Direction Governing Jurisdiction Where Will Is
to Be Probated..... 12-28

**Chapter 13 Execution of Wills and Trusts and
Procedural Considerations**

§ 13:1 Will Execution 13-2

 § 13:1.1 Execution Pages/Provisions 13-2

 [A] Testimonium Clause..... 13-3

 [B] Attestation Clause 13-3

 [C] Affidavit of Attesting Witnesses 13-5

 [D] Testator’s Written Acknowledgment of
Disclosure..... 13-5

 § 13:1.2 Process of Completing and Signing the Will..... 13-6

 [A] Selection of Witnesses 13-8

 [B] Will Execution Ceremony 13-11

 § 13:1.3 Choice of Law 13-14

 § 13:1.4 Revocation of Previous Wills 13-14

 § 13:1.5 Will Execution Requirements Under UPC 13-15

 § 13:1.6 Electronic Wills..... 13-16

§ 13:2 Execution of Trusts 13-16

 § 13:2.1 Preliminary Considerations—Inter
Vivos Trusts 13-17

 [A] Revocability 13-17

 [B] Unilateral or Bilateral 13-18

 [C] Number of Trust Instruments..... 13-19

 § 13:2.2 Trust Situs/Choice of Law 13-19

 [A] Selected Favorable Attributes of Trust-Friendly
Jurisdictions..... 13-21

 [A][1] State-Level Income Tax Savings..... 13-22

 [A][2] Enhanced Creditor Protection 13-24

 [A][3] Bifurcation of Duties 13-26

 § 13:2.3 Execution Formalities 13-26

 § 13:2.4 Funding—During Life and at Death..... 13-27

 § 13:2.5 The Uniform Trust Code (UTC) Approach..... 13-28

Table of Contents

§ 13:3 Fraud, Duress, and Undue Influence During the Preparation and Execution Process 13-29

§ 13:4 Holographic Wills, Forms, and Computer-Assisted Drafting..... 13-33

 § 13:4.1 Holographic Wills 13-33

 § 13:4.2 Pre-Printed Forms 13-34

 § 13:4.3 Computer-Assisted Drafting 13-34

§ 13:5 Joint or Reciprocal Documents 13-35

 § 13:5.1 Joint Wills..... 13-36

 § 13:5.2 Joint Trusts 13-37

 § 13:5.3 Mirror-Image Wills or Trusts 13-37

 [A] Mirror-Image Documents: Ongoing Litigation..... 13-38

§ 13:6 Safekeeping of Executed Estate Planning Documents 13-40

§ 13:7 Review and Revision of Estate Planning Documents 13-43

 § 13:7.1 Codicil or New Will? 13-44

 § 13:7.2 Trust Amendment or Restatement? 13-45

§ 13:8 Revocation and Reformation..... 13-46

 § 13:8.1 Revocation of Prior Wills..... 13-47

 § 13:8.2 Revocation of Trusts 13-48

 § 13:8.3 Reformation of Wills and Trusts 13-49

 § 13:8.4 Potential Tax Concerns Specific to Trust Reformation or Revocation 13-51

§ 13:9 Trust Decanting..... 13-52

 § 13:9.1 New York Decanting Statute..... 13-55

 § 13:9.2 The Uniform Trust Decanting Act (UTDA)..... 13-58

 § 13:9.3 Model Pourover/Decanting Language 13-58

Chapter 14 Lifetime Irrevocable Trusts

§ 14:1 Considerations Regarding Inter Vivos Trusts 14-2

 § 14:1.1 Need for Coordinated Estate Plan 14-3

 § 14:1.2 Impact on Available Tax Exemptions at Death..... 14-4

 § 14:1.3 Adjustment Clauses..... 14-4

§ 14:2 Grantor Trusts..... 14-8

 § 14:2.1 Background on Grantor Trust Rules..... 14-8

 [A] A Word on Nomenclature..... 14-9

 § 14:2.2 Uses of Intentionally Defective Grantor Trusts (IDGTs)..... 14-10

 § 14:2.3 Methods of Creating Grantor Trust Status..... 14-12

 [A] Statement of Intent to Be Treated As a Grantor Trust 14-12

 [B] Power of Disposition by Non-Adverse Party 14-12

 [C] Power to Add Beneficiaries..... 14-13

[D]	Administrative Powers—Power to Substitute Property	14-14
[E]	Power to Lend	14-15
[F]	Power or Interests of the Grantor’s Spouse	14-16
§ 14:2.4	Grantor Trusts for Foreign Grantors	14-16
§ 14:2.5	Grantor Trust Exit Strategy	14-17
§ 14:2.6	Beneficiary As Owner for Grantor Trust Purposes	14-18
§ 14:2.7	Impact of Change of Grantor Trust Status	14-19
§ 14:2.8	Payment of Taxes and the Right of Reimbursement	14-22
§ 14:3	Crummey Power Trusts	14-24
§ 14:3.1	Who May Hold the Power	14-25
§ 14:3.2	What Triggers the Crummey Power?	14-26
§ 14:3.3	Creation of Power	14-27
§ 14:3.4	How Large Should the Power of Withdrawal Be?	14-27
§ 14:3.5	Lapse of the Power	14-30
§ 14:3.6	Hanging Powers	14-31
§ 14:3.7	GST Issue	14-32
§ 14:3.8	Notice	14-33
§ 14:3.9	Minors and Incapacitated Persons	14-34
§ 14:3.10	Modification of Crummey Powers	14-34
§ 14:3.11	Restrictions on Other Distributions	14-35
§ 14:3.12	Sample Withdrawal Powers—Composite Model	14-36
§ 14:4	Dynasty Trusts	14-39
§ 14:5	Community Property Trusts	14-39
§ 14:6	Charitable Trusts	14-41
§ 14:7	Self-Settled Asset Protection Trusts	14-41
§ 14:7.1	Tax Planning and Asset Protection Trusts	14-45
§ 14:8	Insurance Trusts	14-46
§ 14:8.1	Impact of Death Within Three Years of Transfer of a Policy to the Trust	14-53
§ 14:9	Qualified Personal Residence Trusts (QPRTs)	14-53
§ 14:10	Grantor Retained Annuity Trusts (GRATs)	14-57
§ 14:10.1	Two-Life GRAT Annuities	14-60
§ 14:10.2	Additional GRAT Details	14-61
§ 14:10.3	GRAT Comparison to Sale to Intentionally Defective Grantor Trust	14-64
§ 14:11	2503(c)(3) Trusts	14-66
§ 14:11.1	Alternative Vehicles for Holding Property for Minors	14-67
§ 14:12	Grantor Retained Interest Step-Up Trusts (GRISUTs)	14-68

Chapter 15 Other Estate Planning Documents

§ 15:1 General Considerations 15-2

§ 15:2 Will Substitutes 15-2

 § 15:2.1 Life Insurance and Retirement Plans 15-3

 § 15:2.2 Joint Property..... 15-4

 § 15:2.3 Bank Accounts and Securities 15-6

 [A] Bank Accounts..... 15-6

 [B] Securities 15-8

 § 15:2.4 Tax Considerations 15-9

§ 15:3 Durable Powers of Attorney 15-10

 § 15:3.1 Varieties of Powers of Attorney..... 15-12

 § 15:3.2 Power of Attorney Statutes..... 15-14

 [A] New York Power of Attorney Statute 15-15

 [A][1] New York Statutory Short-Form Power of
 Attorney 15-17

 [A][1][a] Modifications Section..... 15-19

 [A][2] Procedure for Acceptance or Rejection of a
 Power of Attorney..... 15-20

 [A][3] Penalties for Unreasonable Refusal to Accept
 a Valid Power of Attorney 15-21

 [A][4] Safe Harbor for Third Parties Acting
 in Good Faith 15-21

 [B] Connecticut Power of Attorney Statute 15-22

 § 15:3.3 Special Powers: Making Gifts and
 Amending Trusts 15-22

 [A] Gifts Under Durable Power..... 15-22

 [B] Creating or Amending Trusts..... 15-26

 § 15:3.4 Execution and Other Considerations 15-27

§ 15:4 The Living Will and Health Care Proxy 15-30

 § 15:4.1 The Living Will..... 15-34

 [A] Physician Orders for Life-Sustaining
 Treatment 15-37

 § 15:4.2 The Health Care Proxy 15-37

 [A] Choice of Health Care Agent 15-40

 [B] Providing Instructions for the Health
 Care Agent..... 15-40

 [C] Naming a Conservator or Guardian..... 15-42

 [D] HIPAA 15-43

 § 15:4.3 Medical Decisions in the Absence of Living
 Will or Health Care Proxy..... 15-44

§ 15:5 Disposition of Organs and Remains 15-46

§ 15:6 Standby Guardians for Minors..... 15-48

 § 15:6.1 Standby Guardian Sample Language 15-50

§ 15:7 Religious Estate Planning Documents 15-51

Chapter 16 Certain Ethical Considerations and Potential Claims Against Attorneys

§ 16:1 Introduction 16-2

 § 16:1.1 Reasons for Concern 16-2

§ 16:2 Factors to Consider When Undertaking Representation 16-3

 § 16:2.1 Degree of Expertise Required 16-4

 § 16:2.2 Availability of Relevant Facts 16-4

 § 16:2.3 Dealing with Questionably Competent Clients 16-5

§ 16:3 Ethical Duties 16-6

 § 16:3.1 Conflicts of Interest in Estate Planning and Administration 16-7

 [A] Lawyer As Beneficiary or Fiduciary 16-8

 [B] Potential Conflicts of Interest Between Clients 16-9

 [B][1] Spouses 16-9

 [B][2] Beneficiary and Testator 16-12

 [B][3] Beneficiary and Fiduciary 16-13

 [C] Lawyer As Intermediary 16-14

 § 16:3.2 Letters of Engagement 16-14

 § 16:3.3 Other Ethical Issues 16-15

 [A] Dormant Representation 16-15

 [A][1] The “Disengagement” Letter 16-16

 § 16:3.4 Duty to Safeguard Client Information 16-17

§ 16:4 Legal Duties and Malpractice 16-17

 § 16:4.1 Privity: The Historic Barrier to Malpractice Liability 16-18

 [A] New York Approach 16-20

§ 16:5 Drafting Defects 16-22

 § 16:5.1 Errors in Transcription 16-23

 § 16:5.2 Ambiguities 16-24

 § 16:5.3 Tax Problems 16-26

 § 16:5.4 Unanticipated Changes in Facts 16-27

 § 16:5.5 Construction and Reformation As Remedies 16-28

§ 16:6 Execution Errors 16-29

 § 16:6.1 Types of Errors 16-29

 [A] Signing Errors 16-30

 [B] Number and Qualifications of Witnesses 16-32

 [C] Other Execution Errors 16-34

 § 16:6.2 Assessing the Risk of Malpractice 16-35

§ 16:7 Claims Based on Common Law Doctrines Affecting Validity of an Instrument 16-37

 § 16:7.1 Testamentary Capacity 16-38

 § 16:7.2 Undue Influence 16-40

Table of Contents

§ 16:7.3 Fraud 16-41
§ 16:7.4 Interference with an Expectancy of
Inheritance 16-42
§ 16:8 Duty to Retain Wills 16-43
§ 16:9 Protective Measures to Avoid Malpractice Liability 16-43

Appendices App.-1

Appendix A Simple Will (Without Trusts) App. A-1
Appendix B Pour-Over Will App. B-1
Appendix C Complex Will (With Trusts) App. C-1
Appendix D Self-Proving Affidavits for Witnesses upon
Execution of Will App. D-1
Appendix E Codicil App. E-1
Appendix F Model Disclosure Agreement for SCPA
Section 2307-a in New York App. F-1
Appendix G Revocable Trust App. G-1
Appendix H Qualified Personal Residence Trust
(QPRT) App. H-1
Appendix I Grantor Retained Annuity Trust (GRAT)
Provisions App. I-1
Appendix J Power of Attorney—New York Statutory
Short Form App. J-1
Appendix K New York Statutory Gifts Rider—
Authorization For Certain Gift
Transactions App. K-1
Appendix L Combined Health Care Proxy and
Medical Directive App. L-1
Appendix M Medical Directive
(No Health Care Proxy) App. M-1
Appendix N Health Care Proxy
(No Medical Directive) App. N-1
Appendix O New York State Department of Health,
Health Care Proxy Instructions,
Explanations, and Form App. O-1
Appendix P The Medical Directive (and Health Care
Proxy) Developed by Dr. Linda L. Emanuel
and Dr. Ezekiel J. Emanuel App. P-1
Appendix Q The Halachic Living Will
(Including Proxy) App. Q-1

Appendix R	New Jersey Proxy Directive—(Durable Power of Attorney for Health Care) Designation of Health Care Representative.....	App. R-1
Appendix S	New Jersey Combined Advance Directive for Health Care	App. S-1
Appendix T	New Jersey Instruction Directive (Without Proxy).....	App. T-1
Appendix U	Connecticut Form Concerning Health Care and Withholding or Withdrawal of Life Support Systems	App. U-1
Appendix V	Connecticut Health Care Instructions Form	App. V-1
Appendix W	Connecticut Appointment of Health Care Representative Form	App. W-1
Appendix X	Florida Living Will	App. X-1
Appendix Y	Florida Designation of Health Care Surrogate.....	App. Y-1
Appendix Z	Illinois Declaration Regarding Health Care	App. Z-1
Appendix AA	Illinois Statutory Short Form Power of Attorney for Health Care	App. AA-1
Appendix BB	California Advance Health Care Directive	App. BB-1
Appendix CC	Georgia Advance Directive for Health Care	App. CC-1
Appendix DD	New York Appointment of Agent to Control Disposition of Remains.....	App. DD-1
Table of Authorities		T-1
Index		I-1