A Potpurri of Trust Provisions and Estate Planning Techniques for Modern Drafting

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About the Presenters...

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I. Introduction

A. Changes in Demographics

1. 1950’s to 1960’s: advisors dealt with “Ozzie and Harriet”
   a. First marriage for husband and wife
   b. All children from that marriage

2. 1970’s to 1980’s: advisors began to deal with “The Brady Bunch”
   a. Second marriage for husband and wife, either due to divorce or death of first spouse
   b. Children from both marriages

3. 1990’s to present: advisors now have to deal with “Modern Family”
   a. Unmarried cohabitation, either because a couple chooses not to marry or they cannot legally marry due to the present state of federal and state laws
   b. Children from either parent or through surrogacy

4. The 2010 U.S. Census Bureau Statistics show these changing demographics
   a. 48% of the US population is considered a married couple household
   b. Remaining 52% is made up of”
      (i) Single male with children 4.7%
      (ii) Single female with children 13%
      (iii) Same-sex couples 0.57% (probably undercount)
      (iv) Unmarried individuals 33%
B. Estate Planning Objectives

1. Preparing an estate plan is a complicated and daunting task for most married couples. Second marriages and unmarried individuals face even more unique challenges in estate planning.
   a. Federal tax law and state intestacy laws provide married couple with the ability to avoid taxes and leave assets to the objects of their natural bounty without the need for extensive planning.
   b. Married and unmarried couples have the same objectives in estate planning: making sure assets pass to the people they want to receive their assets at the lowest cost, both in taxes and administration, and in the least intrusive manner.
   c. Both also want to be able to have people they choose make health care and financial decisions in case they become disabled during their lifetime and cannot make those decisions themselves.

C. In a letter dated January 23, 2004 from the United States General Accounting Office Associate General Counsel Dayna K. Shah to then Senate Majority Leader Bill Frist, there are 1,138 benefits, rights and protections provided on the basis of marital status in Federal law.

   1. Obviously, unmarried couples cannot take advantage of these provisions.
   2. Additionally, unless changed by state law, they cannot take advantage of certain default provisions in state law.

D. Therefore, unmarried couples are at a distinct disadvantage regarding certain estate planning techniques and protections enjoyed by married couples, including, but not limited to:

   1. the unlimited marital deduction for gift and estate tax;
   2. gift-splitting;
   3. intestacy laws in the event there is no will;
   4. presumption that a spouse can make health care decisions (even in the absence of a health care proxy, but if a hospital receives federal funds, this presumption is now extended to partners by executive order);
   5. elective share rights;
   6. marital/community property rights;
   7. presumption of joint tenancies, no tenancy by the entirety;
8. ERISA benefits on retirement plans, and spousal rollovers of retirement plan benefits;

9. surviving spouse Social Security benefits;

10. various income tax benefits, like married filing jointly, primary residence sale exemption, and divorce agreements deemed to be made for full and adequate consideration; and

11. ending of the relationship does not automatically terminate provisions in wills, trusts, and beneficiary designations that occur with divorce of opposite sex couple.

E. Additionally, a contest by family members of unmarried couples are more likely, especially if they disapprove of the relationship, so the importance of proper planning and formalities are increased.

II. PLANNING FOR SECOND (OR MORE) MARRIAGES

A. Estate Planning Provisions in a Prenuptial Agreement

1. Wisconsin has adopted a marital property system which is similar to the community property systems in certain other states.

   a. The marital property system creates rights in property during marriage and upon the death of either spouse.

   b. Under the law, all property and income of either party acquired during the marriage is presumed to be marital property in which each spouse has a one-half interest.

      (i) Income on marital property, such as rents, dividends and interest as well as appreciation on marital property, is also marital property.

      (ii) All income on either party's individual property is also marital property unless the owner of the individual property executes a unilateral statement classifying the income on such property as individual.

      (iii) Such a designation can be made without the consent of the other spouse.

2. Define what is received in the event of divorce in the prenuptial agreement

   a. The classification of assets under the marital property system described above, however, is not the system which is applied at divorce in Wisconsin.
b. There are two distinct issues at divorce, one is the question of property division, and the other is the question of maintenance (formerly called alimony) payments.

(i) In determining the division of the parties' property at divorce, a Wisconsin court will start with the presumption that all property, except property received by a spouse through gift or inheritance, is to be divided equally between the parties.

(ii) However, the court can alter this 50/50 division after considering various factors such as:

(a) the length of the marriage;

(b) the property brought to the marriage by each party;

(c) whether one of the parties has substantial assets not subject to division by the court;

(d) the contribution of each party to the marriage, giving consideration to each party's contribution in homemaking and child care services;

(e) the age, physical and emotional health of the parties;

(f) the contribution by one party to the education, training or increased earning power of the other;

(g) the earning capacity of each party;

(h) the desirability of awarding the family home or right to live there to the party having custody of the children;

(i) the amount and duration of maintenance and child support payments;

(j) other economic circumstances of each party such as pension benefits and future interests;

(k) the tax consequences to each party;

(l) a written agreement by the parties regarding property division;
(m) other factors which the court determines to be relevant.

c. The awarding of maintenance in the event of divorce is a separate question from property division. A marital property agreement is not binding on a divorce court on the question of maintenance, but is only one of the factors to be considered in determining whether maintenance will be awarded and in what amounts.

3. Define how property is classified

a. Property acquired before marriage
b. Property acquired by gift or inheritance
c. Property acquired during marriage
d. Income and appreciation from property

(i) In general, appreciation on the value of property follows the classification of the property, i.e. if marital property appreciates, the appreciation is marital, and if individual property appreciates, the appreciation is individual property.

(ii) However, and this is a significant distinction, appreciation on individual property of a party which is the result of substantial uncompensated efforts by either of the spouses is marital property.

(iii) That is, appreciation on individual property due to the labor of one of the parties for which that party is not adequately compensated is treated differently than passive appreciation on such property.

(iv) The spouse who owns the individual property cannot make such appreciation individual by executing a unilateral statement because such statements are effective only with respect to income, not appreciation.

e. Replacement property

4. Waive rights to property at death

a. Elective share against will/intestacy
b. Agreeing to execute beneficiary designations, especially related to 401(k)’s and pension benefits
5. Property to surviving spouse:
   a. Define how much and in what manner property will be left to surviving spouse at death of first spouse
   b. Consider provisions for establishment of lifetime marital trust at disability of first spouse to avoid surviving spouse being cut off from access to assets

6. Prenuptial agreement should contain provisions regarding portability election, including:
   a. A general provision outlining the intent to make the portability election
      (i) One version contemplates that portability will be elected regardless of which spouse dies first, so it would apply equally to both spouses
      (ii) Another version applies to make the portability election only if the less wealthy spouse predeceases the wealthier spouse
   b. Special provision for estates in excess of the filing threshold
      (i) Usually benefits the wealthier spouse in situations where the less wealthy spouse is not anticipated to use his or her lifetime exemption by requiring a Form 706 to be filed because the value of the estate exceeds the filing threshold
      (ii) Decision regarding the making of the portability election remains at the discretion of the deceased spouse’s fiduciary
   c. Special provision for estates where the less wealth spouse’s estate is under the filing threshold
      (i) The parties agree that the prenuptial agreement requires the portability election to be made
      (ii) Since this provision is more advantageous to the wealthier spouse if the less wealthy spouse dies first, the provision should provide protections for the less wealthy spouses’ beneficiaries by requiring the surviving spouse to bear the costs of preparing the Form 706
   d. Provision related to conflict of interest for the surviving spouse as to the election if they are the Personal Representative to appoint another party to make the portability election
e. Provisions mandating cooperation by the portability executor and the surviving spouse for release of information from the surviving spouse to the portability executor (if not the surviving spouse) and from the portability to the surviving spouse

f. Provision defining the portability executor to include either a court appointed personal representative or the trustee of a revocable trust

7. There are certain steps that should be taken to give a prenuptial agreement the maximum chance of enforceability, including:

a. There must be full disclosure in detail of each part’s assets. An agreement would call for financial statements which must be completed in detail by both parties to the Agreement.

b. The agreement should be signed as far in advance of the wedding as possible. It certainly should not be signed on the eve of the wedding.

c. Both parties should have legal counsel. A potential spouse should select her own independent lawyer to advise her about the agreement and the rights she may be giving up.

d. An agreement can be amended at any time and we encourage them to be reviewed periodically. During the course of a marriage, feelings may change, the laws may change and the circumstances surrounding a marriage may change.

e. Under Wisconsin law, to the extent there are liabilities which are classified as the individual obligation of either spouse, an agreement would not be binding on creditors unless they are provided with a copy of the agreement before the debt was incurred; so if either party is obtaining a loan from a bank and they intend the debt to be an individual property obligation, they must give a copy of the agreement to the lender prior to signing the loan documents.

B. Provisions in Estate Planning Documents

1. Estate planners primary objective in second marriage situations should be to create an estate plan that provides the least possible opportunity for conflict between the spouse and the decedent’s children

2. Find and develop opportunities for all parties to benefit financially

3. Who will serve as fiduciaries?

a. Personal representative in will
(i) Power over various elections

(ii) Consider issues where conflict of interest might arise between a second spouse and children, like portability

b. Trustee of any continuing trusts for spouse and children
   (i) Determines investments and distributions
   (ii) Consider independent Trustee of trusts for spouse
   (iii) Consider provisions on how trustees are removed
   (iv) Consider breaking up the duties of the trustee between Administrative, Investment, and Distribution

c. Agent in health care power of attorney

d. Agent in durable power of attorney
   (i) Normally includes a gifting power, could cause tension between second spouse and children
   (ii) Can include provisions regarding entering into marital agreements, potentially need to limit to funding a living trust
   (iii) Provisions regarding beneficiary designations on retirement plans

C. Use of Exemptions and Exclusions

1. Consider assets of both spouses
   a. Not just monetary, but “tax” assets
   b. Exemptions and portability

2. Plan to use both spouses annual exclusions, so consider splitting gifts

3. Plan to use both spouses estate tax, gift tax, and generation skipping transfer tax exemptions

4. Equalization of estates or use of exemptions through creation of lifetime trusts

5. Definitions of spouse and children
a. Consider alternative arrangements that might be needed to define spouse, like domestic partnership

b. Consider including provisions to define when a marriage or relationship is considered terminated

c. Provisions that limit a spouse to only an opposite sex spouse may be void as against public policy

d. Specify if children are children of either or both Settlors in second marriages

e. Consider how adopted children are treated and when the adoption occurs (usually before age 18)
f. Consider how children that result from assisted reproductive technology are treated

6. Review of formula clauses

a. Due to the increased estate tax exemption amounts, practitioners should review formula clauses in trusts to ensure that either the marital trust or the credit shelter trust is not receiving proportionately more of the client’s assets than anticipated or desired

b. This will be especially important in a second marriage situation where the spouse is not a beneficiary of the credit shelter trust

D. Disposition at First Spouse Death

1. If divorced and minor children, the divorce decree may mandate assets left to minor children at death

2. What should be done with estate tax exemption amount?

a. If directly to children, how much does that leave spouse

b. If to a Family Trust, who are the beneficiaries and Trustee

3. Advantage of continued use of credit shelter trusts

a. Surviving spouse might remarry

   (i) Portability may be lost if the surviving spouse remarries and is later widowed again because the DSUEA may only be used for the “last” deceased spouse

   (ii) Protects inheritance of children from first marriage
b. Portability does not apply to the GST tax
   (i) Therefore, in order to fully leverage the GST exemption of both spouses for dynasty trust planning (to mitigate estate taxes in subsequent generations), it will still be necessary to create a trust at the first spouse’s death

c. Credit shelter trusts provide asset protection, keeping trust assets from the reach of the surviving spouse’s creditors

d. Credit shelter trusts protect appreciated assets from estate tax at the second spouse’s death, but assets in the credit shelter trust do not receive a step-up in basis at the second spouse’s death

e. Current plan already contains a credit shelter trust

f. State of residence has an estate tax

g. Congress may change the estate law

4. Use of Marital Trust (QTIP) trust for marital deduction

5. Augment children through life insurance
   a. If assets go to spouse in trust, children may be waiting a long time before they receive inheritance

E. Structure of Marital Trust

1. Mandatory provisions to receive marital deduction
   a. Spouse must be sole beneficiary
   b. Must distribute all income annually to spouse
   c. Spouse must have the ability to direct the Trustee to convert non-productive assets

2. Options for principal distributions
   a. No principal distributions
   b. For health, education, support or maintenance
   c. Broader standards
   d. Unitrust: reduces tension on investment decisions between growth and income
3. To allow greater flexibility in investments, consider waiving the prudent investor rule, especially if dealing with closely held business interests.

4. Consider including a provision in the trust to appoint a special Trustee to make distributions of principal to allow spouse to make annual exclusion gifts.

5. Special power of appointment to children of first spouse.

III. Same-Sex Marriage

A. Article IV, section 1 of the U.S. Constitution, referred to as the "Full Faith and Credit Clause" requires each state to give full faith and credit to the laws of other states. The Defense of Marriage Act (DOMA) was enacted by President Clinton on September 21, 1996, primarily as a reaction to a Supreme Court of Hawaii’s 1993 ruling that state must show a compelling interest in prohibiting same-sex marriage.

B. Under DOMA, marriage is only between one man and one woman, thus no state is required to respect a same-sex marriage performed in another state.

1. Section Two of DOMA states that no other state is required to treat as married same-sex couples legally married in another state.

2. Section Three of DOMA states that, for federal purposes, “marriage” means only a legal union between one man and one woman as husband and wife, and the word “spouse” refers only to a person of the opposite sex who is a husband or a wife.

3. As noted below, since the enactment of DOMA, thirty-eight states enacted similar language regarding the definition of marriage, including Wisconsin.

4. As a result of DOMA, same-sex couples legally married in one state would not enjoy those marital rights if they move to another state that does not recognize that marriage.

C. In February of 2011, the US Attorney General Eric Holder released a memorandum regarding two cases challenging the definition of marriage under DOMA.

1. This memorandum essentially stated the Obama Administration had made its own determination that the definition of marriage under DOMA was not constitutional, and therefore, the United States Justice Department would no longer defend the constitutionality of that definition under DOMA.
D. On June 26, 2013, the United States Supreme Court decided the Windsor case, and held that Section Three of DOMA was unconstitutional.

2. Case involved the plaintiff, Edith Windsor, being denied a marital deduction on the estate tax return of her deceased spouse and seeking a refund of the estate tax paid of $363,053.

a. Plaintiff and her wife were legally married in Canada, and their Canadian marriage was recognized by New York.

b. Plaintiff argued that Section Three of DOMA was unconstitutional because it discriminated against her by treating her differently from similarly situated individuals married to persons of the opposite sex.

c. In a 5-4 decision, the Supreme Court held Section Three of DOMA to be unconstitutional “as a deprivation of the equal liberty of persons that is protected by the Fifth Amendment.”

2. Therefore, any same-sex married couple that lives in a state that recognizes same-sex marriage is to be treated the same for all purposes as any other married couple, and thereby are entitled to all of the 1,138 rights and privileges under federal law that are granted to married persons, which includes federal tax law.

3. Section Two of DOMA was unaffected by Windsor.

a. Therefore, a same-sex couple that marries in a state that recognizes same-sex marriage who then moves to a state that does not recognize same-sex marriage would not be treated as married if the state of residence determines whether a couples is considered married, as opposed to the state of ceremony determining if a couple is married.

b. Absent guidance from the IRS and/or the Treasury Department, a same-sex couple legally married in a recognition jurisdiction that move to a state that does not recognize same-sex marriage, would most likely not be treated as married for federal tax law purposes.

c. This is because the majority of federal tax laws are determined by a couple’s state of residence, not the state of ceremony of their marriage.
After *Windsor*. On June 6, 2014, U.S. District Judge Barbara Crabb declared that Wisconsin’s 2006 amendment to the state constitution banning gay marriage violated the U.S. Constitution's guarantee of equal treatment under the law.

1. As a result of the decision that the ban was unconstitutional, starting on June 6, many state county clerks, including those in Milwaukee and Dane Counties, began to issue marriage licenses to same-sex couples, even though Judge Crabb’s ruling did not grant the injunction against enforcement of the ban requested by the plaintiffs in the case. She instead gave the plaintiffs 10 days to submit their requested relief to her.

2. Wisconsin Attorney General JB Van Hollen requested a stay of the decision, both from Judge Crabb and from the 7th Circuit Court of Appeals, pending appeal of Judge Crabb’s June 6th decision to the 7th Circuit.

3. On October 6, 2014, the United States Supreme Court refused to hear appeals from five states, including Wisconsin, from the 7th, 10th, and 4th Circuit Courts of Appeal decisions that struck down the state bans, thus legalizing same-sex marriage in states in those circuits, including Wisconsin.

4. But, as noted below, as of November 6, 2014, there was a split in federal circuit court decisions.

5. Prior to November 6, 2014, all federal circuit courts that had heard appeals regarding state bans had found them unconstitutional

   a. 9th Circuit on February 7, 2012; 10th Circuit on June 25, 2014; 4th Circuit on July 28, 2014; and 7th Circuit on September 4, 2014, and SCOTUS refused on October 6, 2014 to hear the cases from the 10th, 4th, and 7th Circuits; 9th Circuit discussed below.

   b. But, the 6th Circuit on November 6, 2014 in *Obergefell et. V. Hodges*, ruled that the state law bans on same-sex marriage in Michigan, Ohio, Kentucky and Tennessee were constitutional.

   c. As a result of this 6th Circuit decision, there was a split in federal circuit courts on the issue of same-sex marriage, and, as a result of that split, SCOTUS took up the same-sex marriage ban issue related to two questions:

      (i) Does the Fourteenth Amendment of the US Constitution require a state to license a marriage between two people of the same sex; and

      (ii) Does the Fourteenth Amendment of the US Constitution require a state to recognize a marriage between two people
of the same sex when their marriage was lawfully licensed and performed out-of-state.

6. Arguments were heard on April 28th and in a 5-4 decision issued on June 26, 2015, SCOTUS struck down all state marriage bans based on equal protection and due process grounds.


1. Under the Revenue Ruling, same-sex couple legally married in jurisdictions that recognize their marriage will be treated as married for ALL federal tax purposes.

2. The Ruling cited Revenue Ruling 58-66 that related to common law marriages being recognized across state lines regardless of whether the state of domicile of the couple recognized common law marriages.

3. As a result, legally married same-sex couples are treated the same as legally married opposite-sex couples for federal tax purposes if the state of ceremony of their marriage recognizes same-sex marriage even if their state of residence does not recognize same-sex marriage.

4. This Ruling did not impact state law rules regarding the definition of marriage and complicated income tax filings for same-sex couples legally married but living in a state that did not yet recognize their marriage during 2013, like Wisconsin.

G. Federal Tax Impact of Windsor Ruling. These selected IRS questions and answers from Notice IR-2013-72 issued August 29, 2013, reflect the holdings in the Windsor case.

1. For federal tax purposes, the IRS looks to state or foreign law to determine whether individuals are married.

   a. Its general rule recognizes a marriage of same-sex spouses validly entered into in a domestic or foreign jurisdiction, if its laws authorize the marriage of two individuals of the same sex.

   b. This is true even if the married couple resides in a domestic or foreign jurisdiction not recognizing the validity of same-sex marriages.

2. For tax year 2013 and thereafter, same-sex spouses generally must file as either married filing separately or jointly.
a. For tax year 2012 and all prior years, same-sex spouses who filed an original tax return on or after September 16, 2013 (the effective date of Revenue Ruling 2013-17), generally must file as married filing separately or jointly.

b. For open tax years, same-sex spouses who filed their tax returns timely may choose (but are not required) to amend their federal tax returns to file a married filing separately or jointly, provided the period of limitations for amending the return has not expired.

c. A taxpayer generally may file a claim for refund for three years from the date the return was filed or two years from the date the tax was paid, whichever is later.

3. For federal tax purposes, the IRS general rule recognizes a marriage of same-sex individuals validly entered into in a domestic or foreign jurisdiction whose laws then authorized the marriage of two individuals of the same sex; this is true even if the married couple now reside in a domestic or foreign jurisdiction not recognizing the validity of same-sex marriages.

4. A taxpayer's spouse cannot be a dependent of the taxpayer.

5. A married taxpayer cannot file as a head of household.

6. Section 63(c)(6)(A) of the Internal Revenue Code prohibits one spouse from itemizing deductions if the other spouse claims the standard deduction.

7. For all years for which the period of limitations for filing a refund claim is open (the later of three years from the date the return was filed or two years from the date the tax was paid) one may be filed.

a. The Service indicated that amending returns was the option of the taxpayer.

b. For individual returns, an amended Form 1040 should be filed.

c. For estate and gift tax returns, an amended Forms 706 and 709 should be filed if no tax was paid. If taxpayers wish to file a refund claim for gift and estate taxes should be filed using Form 843, Claim for Refund and Request for Abatement.

d. For example, if an employer provided health coverage for an employee's same-sex spouse, the employee may claim a refund of income taxes paid on the value of coverage that would have been excluded from income had the employee's spouse been recognized as the employee's legal spouse for tax purposes.
e. This refund claim generally would be made by filing an amended Form 1040.

8. A participating employee of an employer with a cafeteria plan allowing employees to pay premiums for health coverage on a pre-tax basis, can file an amended return to recover income taxes paid on premiums the employee paid on an after-tax basis for health coverage of the employee's same-sex spouse for all years for which the statute of limitations for filing a refund claim is open.

9. In the situations described in items 7 and 8, the employer may claim a refund for the social security taxes and Medicare taxes paid on the benefits, if the statute of limitations for a refund is open. Alternatively, the employer may claim a refund of, or make an adjustment for, any excess social security taxes and Medicare taxes paid.

10. Qualified retirement plans are required to comply with the following rules, pursuant to Rev. Rul. 2013-17, and guidance was issued in Notice 2014-19 issued in May of 2014:

a. The plan must treat a same-sex spouse as a spouse for purposes of satisfying the federal tax laws relating to qualified retirement plans.

b. A person in a registered domestic partnership (Wisconsin) or civil union is not considered a spouse for purposes of applying federal tax law requirements relating to qualified retirement plans, regardless of whether that person's partner is of the opposite or same sex.

H. Continuing Issues after Obergefell

1. Filing returns: for 2014 and later, a lawfully married same-sex couple must file their Wisconsin individual income tax returns as married filing jointly, married filing separately or, if qualified, as head of household.

2. Estate, gift, and generation skipping transfer tax laws now treat all legally married same-sex couples the same as opposite-sex couples, but, like opposite-sex couples, the cases and the Revenue Ruling do not mitigate the need for same-sex married couples to prepare estate plans.

a. Many property law issues are driven by whether someone is classified as a “spouse” under state law, including who inherits under intestacy and other survivorship rights, all of which can be controlled by a will or trust in non-recognition states.

b. “Double step-up” on the death of the first spouse under IRC § 1014(b)(6) now applies to a same-sex couple in Wisconsin
c. Finally, some states (like Illinois) have state estate and gift tax exemptions that are lower than the current federal estate and gift tax exemptions, which requires careful estate tax planning for all married couples, be they opposite-sex or same-sex.

3. What is effective date of the marriage? Is it the date first married outside of Wisconsin, the date married in Wisconsin (if a ceremony was performed), or the date state marriage bans were struck down by a court?
   a. Marital property implications, including any sales of assets that may have occurred after first death where double step-up should have occurred
   b. Divorce implications (when does marital property law apply)
   c. Social Security implications
   d. Since the bans were found to be unconstitutional by SCOTUS, thus making them void ab initio, argument for date first legally married in a jurisdiction the recognized same-sex marriage

4. Estate planning done before the marriage
   a. Were gifts made that now qualify for the marital deduction
   b. Definitions/identification of persons in documents, including parentage issues when only one spouse is the natural parent
   c. Beneficiary designations

5. Domestic partnerships and civil unions do not equate to marriage.

IV. Wisconsin Domestic Partnerships

A. The Budget Bill created Chapter 770 and amended many other provisions of the Wisconsin Statutes to provide for the establishment and operation of domestic partnerships in Wisconsin. Beginning on August 3, 2009, same sex couples have been able to apply for a declaration of domestic partnership.

1. A declaration of domestic partnership provides same sex domestic partners with forty-eight (48) certain rights and benefits in Wisconsin that are substantially similar in several ways to more the eleven-hundred (1,138 in fact) rights and benefits provided to married opposite sex couples under current law simply as a result of marital status.

2. Wisconsin was the first state to have both a constitutional ban on same-sex marriage, but also provide for registration by same-sex couples as domestic partners.
B. **Criteria for Forming a Domestic Partnership.** Under § 770.05, in order to qualify for a domestic partnership, two individuals must satisfy the following criteria:

1. each individual is at least 18 years of age and capable of consenting to the domestic partnership;
2. neither individual is married to, or in a domestic partnership with, another individual;
3. the two individuals share a common residence;
4. the two individuals are not nearer of kin to each other than second cousins, whether of the whole or half blood or by adoption; and
5. the individuals are members of the same sex.

   a. Note that opposite sex couples who do not choose to marry cannot register as domestic partners.

   b. Also note that unlike marriage in Wisconsin that allows first cousins to marry if the female has attained the age of 55 or either party submits an affidavit signed by a physician stating that either party is permanently sterile (see § 765.03), domestic partners cannot be closer than second cousins.

C. **Formation of Domestic Partnership.** The procedures for completing and filing the application for domestic partnership are found in §§ 770.07 and 770.10.

1. First, an application is made to the county where at least one of the partners resides, including certain documentation for proof of identity and residence.

2. A fee, established and varying by county, is paid, and the county clerk issues a declaration which is signed by both domestic partners, recorded with the register of deeds, and sent to the state registrar of public records (similar to the procedure with a marriage license).

3. Milwaukee County requires not just a social security number, but one’s actual social security card (pursuant to Fair Wisconsin’s Registration Guide).

D. **Termination of Domestic Partnership.** The procedures for terminating a domestic partnership are found in § 770.12.

1. It can be unilaterally terminated by either partner through the filing of a notice of termination with the clerk in the county that issued the declaration.
2. If only one partner signs the termination, they must file an affidavit of service that the other partner received the termination, or if the other partner cannot be located, notice can be done by publication.

3. The county clerk then issues a certificate of termination, which is then recorded with the register of deeds and forwarded to the state registrar of public records, and the termination is effective 90 days after recording.

4. A domestic partnership may also be terminated if one of the domestic partners enters into a marriage that is recognized by the state of Wisconsin (therefore, if the registered domestic partners now get married, their domestic partnership terminates).

5. Unlike the criteria for forming a domestic partnership, an existing domestic partnership does not disqualify someone from getting married in Wisconsin under § 765.03(1).

E. Enumerated Rights Once Registered. Individuals who satisfy the above criteria and successfully apply for a declaration of domestic partnership, as well as parents of children who are or may become registered partners, should then be aware of certain estate planning considerations that result from the registration, including, but not limited to, the following:

1. Ownership of Property (Joint Tenancy) and Potential Tax Consequences.
   a. A joint tenancy is the ownership of property by two or more persons in which each person owns an undivided interest in the entire property with a right of survivorship.
   b. Under § 700.17, each joint tenant owns an equal interest in the whole property for the duration of the tenancy, irrespective of unequal contributions at the creation of the tenancy.

2. Transfer of Property to Heirs in the Absence of a Will.
   a. If an individual dies without a Will, Wisconsin law applies default rules to determine who will receive the assets of the deceased individual (also called the law of intestacy).
   b. These default rules determine who among the decedent’s surviving spouse, domestic partner, children, parents, siblings and more remote relatives (related by blood or adoption) would receive the assets of the deceased person's estate.

3. Exclusion from a Deceased Individual's Will. In general, if a deceased spouse had prepared an estate plan prior to the marriage that excluded the surviving spouse or domestic partner, the surviving spouse or domestic partners is entitled to a share of the deceased spouse's estate.
4. **Termination of Domestic Partnership: Removal of Former Domestic Partner as a Beneficiary, Agent, Personal Representative or Trustee.**

   a. For married individuals, a divorce, annulment or similar event would revoke any revocable transfer of property made by the deceased individual to his or her former spouse or relative of the former spouse.

   b. With the domestic partnership law, the termination of a domestic partnership is viewed the same as a divorce, annulment or similar event.

F. These are only some of the more important changes impacting estate planning under the new Wisconsin domestic partnership law. As with married couples, they should NOT be relied upon solely and should not take the place of a comprehensive estate plan that includes wills, revocable trusts, financial powers of attorney, health care powers of attorney, living wills, and authorization for final disposition of remains.

V. **Estate Planning Documents and Techniques for Unmarried Couples**

A. **Avoiding State Default Laws.** Most unmarried couples will want to avoid their state's intestacy laws.

   1. They also want to avoid state default laws on priority as to whom would serve as personal representatives, trustees, guardians, agents under a financial power of attorney, agents under a health care power of attorney, as well as who has the power to dispose of their remains.

   2. Therefore, unmarried couples should prepare and use wills; will substitutes, such as joint property (being mindful of inadvertent gifting issues discussed above), beneficiary designations, and transfer-on-death (TOD) accounts; revocable living trusts; powers of attorney for financial matters; health care powers of attorney; advance directives and burial instructions to avoid state law.

   3. **Drafting issues to consider:**

      a. Care must be taken in preparation and execution of these documents to minimize the risks associated with contests from potentially disapproving family members of a partner.

      b. If one partner has minor children, drafters should attempt to document the rights of the surviving partner over those minor children, which will most likely involve discussions with relatives of the partner with the minor children.
c. Consider carefully the contingent remainder beneficiaries after the partners’ deaths or termination of the relationship.

d. Determine how the termination of the relationship determined, regardless of whether the couple has registered as domestic partners.

e. Portability is not available for unmarried same-sex couples, so use of a by-pass or family trust in the estate plan has enhanced importance for same-sex couples to minimize estate taxes upon both deaths.

f. Also, drafting should consider who is deemed to have survived if there are simultaneous deaths of the partners.

g. If reciprocal bequests or distributions are made in both partners’ will or trust, make sure that the documents are clear regarding whether the distributions are satisfied from both in the event of simultaneous death.

h. Consider the impact on estate planning documents due to the repeal of the bans on same-sex marriage.

(i) For Wisconsin clients, consider adding a provision to the definition of a “spouse” in documents to include a domestic partner and “marriage” to include a domestic partnership, as both terms are defined in § 770.01.

(ii) Estate plans prepared today may not be updated as frequently as planners may like to take into changes in law (and public perception), and both are rapidly changing in this area.

4. Avoiding Contests by Disapproving (or Just Greedy) Relatives.

a. The use of nonprobate methods of property disposition, like a fully funded revocable trust and beneficiary designations done well in advance of a partner’s death will make attacks against the methods by contesting relatives.

b. Observe strict execution formalities and take extra steps to document decision making process to avoid claims of undue influence.

c. Consider the use of separate representation for partners to avoid potential attacks of undue influence of one partner over another.
d. If allowed under state law, include an "In Terrorem" clause in the will or revocable trust agreement to provide that any person contesting the will or trust would receive nothing.

e. In Wisconsin, § 854.19 severely limits the ability to use In Terrorem clauses by providing that “A provision in a governing instrument that prescribes a penalty against an interested person for contesting the governing instrument or instituting other proceedings relating to the governing instrument may not be enforced if the court determines that the interested person had probable cause for instituting the proceedings.”

f. If same-sex marriage is permitted in the state under which estate planning documents are governed, it would most likely be against public policy to limit the definition of “spouse” to a spouse of the opposite sex in a planning where the grantor may not approve of a beneficiary’s same-sex marriage

B. Gifting Strategies

1. Gift Tax Exemption and Exclusions. Unmarried partners may earn substantially different incomes or have accumulated different amounts of wealth.

a. Unlike married couples, unmarried couples cannot easily equalize estates through spousal gifts due to the absence of the unlimited marital deduction.

b. Use of these exemptions and exclusions will be particularly beneficial when the wealthier partner's estate is over the estate tax exemption, the less wealthy partner's estate is below that amount, and they wish to benefit the same persons at the surviving partner's death.

c. Use the $14,000 per donee annual exclusion, with no limit on the number of donees or the donees' relationships to the donor, to transfer assets between partners.

d. Also, take advantage of unlimited direct payments of the donee's tuition or medical bills which are not subject to gift tax, nor do those transfers count towards the donor's lifetime gift tax exemption or to the $14,000 annual gift tax exclusion.

e. In addition to the annual gift tax exclusion, a donor can gift a cumulative total of up to $5,450,000 (in 2016) to anyone during his or her lifetime without any gift tax.
2. **Gifts to Irrevocable Trusts.** Unmarried couples are often reluctant to make outright gifts to partners because the donor loses control over the gifted property.

   a. By making gifts to an irrevocable trust, especially with the increased lifetime gift tax exemption beginning in 2011, the wealthier partner (settlor) can provide the less wealthy partner (beneficiary) with trust income and/or principal as needed, but can also determine where the remaining trust property will pass upon the beneficiary's death or if the relationship terminates during either partner's lifetime.

   b. Moreover, if the irrevocable trust properly drafted, the beneficiary partner can serve as trustee (limiting distributions to health, education, support and maintenance), the assets remaining in the trust can pass, estate tax free, to the named remainder beneficiaries of the trust upon the beneficiary's death, and the assets could stay in dynasty trusts (if generation skipping exemption is allocated to the gifts).

   c. Note that if the beneficiary partner is more than 37.5 years younger than the settlor partner, generation-skipping transfer tax exemption would need to be allocated to the gift regardless of the continuing trust provisions for the other remainder beneficiaries.

3. **Irrevocable Life Insurance Trusts.** Unmarried couples often purchase life insurance for the benefit of the surviving partner to help supplement future income lost from the inability to do a spousal rollover, and the inability to receive pension survivor benefits.

   a. Life insurance can also be used to create an estate to provide financial security for the surviving partner, or to create the liquidity with which to pay estate taxes upon the death of the first partner to die because of the lack of a marital deduction.

   b. The standard procedural life insurance trust issues that exist for married couples (except for the need for a limited opt-out for life insurance policies and premiums for the trust) exist in a same-sex relationship.

   c. Similar to “qualifying spouse” language in opposite-sex marriage ILIT regarding divorce, the document should terminate any interest of the partner in the event the same-sex relationship is ended.

4. **Low Interest Rate Loans.** In today’s low interest rate environment, same-sex partners should also consider making an interest-only loan from the wealthier partner to the less wealth partner.
a. The loan must bear interest at the Applicable Federal Rate (AFR) published monthly by the IRS (February 2016 annual mid-term rate is 1.82%).

b. The borrowing partner reinvests the loan proceeds, and the appreciation in excess of the AFR will pass to the borrower free of gift tax and will also be excluded from the lender's estate.

c. The loan should be documented with a promissory note, and interest payments made timely to avoid IRS scrutiny that the initial loan was a gift.

5. **Family Limited Liability Company (FLLC).** Use a family limited liability company (FLLC) to have the wealthier partner make gifts to the less wealthy partner on a "discounted" basis while retaining some measure of control over the gifted membership interest as manager.

   a. For example, the wealthier partner could transfer property to an FLLC in exchange for a 1% voting interest and a 99% non-voting interest.

   (i) The nonvoting interests are then gifted to the less wealthy partner (either outright or in trust).

   (ii) The wealthier partner maintains control over the FLLC's assets through the voting interests by naming him- or herself as the manager of the FLLC.

   (iii) Moreover, the gift tax value of the non-voting interests may be discounted because they lack control and marketability.

b. LLC’s are the preferred vehicle over a limited partnership because you can set up an LLC with only one member.

6. **Qualified Personal Residence Trust (QPRT).** Since unmarried same-sex partners are not considered family, there is no need to comply with IRC § 2702 requirement prohibiting a grantor from purchasing back the residence from the QPRT for step-up purposes.

7. **Grantor Retained Income Trusts (GRIT).** A GRIT is an estate planning tool that has been around for many years, but, after the Revenue Reconciliation Act of 1990, GRITs were essentially eliminated as a wealth transfer technique among "family" members.

   a. GRITs are still a viable tool for same-sex couples because IRC § 2702 does not apply to them because the remainder beneficiary is not a lineal descendant of the settlor.
b. A GRIT is an irrevocable trust whereby the settlor (the wealthier partner) transfers assets to a trust while retaining the right to receive all of the net income from the trust assets for a fixed term of years.

(i) At creation of the trust, the value of the remainder interest is treated as a gift to the remainder beneficiary.

(ii) Unlike a GRAT, a GRIT cannot be “zero’d out” for gift tax purposes (the calculation is similar to that of a QPRT). The gift can be reduced by having a longer trust term, but then mortality risks for the settlor are higher.

(iii) The GRIT must pay the net income of the trust to the settlor at least annually.

(iv) At the end of the trust term, the remaining balance in the trust is distributed to the remainder beneficiary, the “unrelated” partner.

(v) If the relationship is terminated during the GRIT term, the trust should be drafted to replace the partner with other remainder beneficiaries (like nieces or nephews) that are not lineal descendants of the settlor.

c. Like a GRAT, if the settlor dies during the trust term, the assets in the GRIT are included in his or her estate, but any gift tax exemption used in establishing the GRIT is restored.

d. As result, like a GRAT, the settlor is in no worse position than if no GRIT was created.

e. If the assets transferred to the GRIT generate income at a rate lower than the IRS's discount rate for the month of the transaction (February 2016 rate is 2.2%), the difference passes to the remainder beneficiary gift tax free.

f. Appreciating stock that does not historically pay dividends (but can) is an example of a good asset to contribute to a GRIT.

8. **GRATs and CLTs.** With GRATs and CLTs, a donor partner can zero-out a gift to a remainder partner, but could still transfer assets to the remainder partner free of gift taxes if the assets in the trust beat the § 7520 rate.

a. If the donor partner wants to retain a stream of income from the lead interest, a GRAT is an effective tool.
b. If the donor partner wants to benefit a charity from the lead interest, a CLT is an effective tool.

c. The donor partner’s private foundation could be the lead charity, with the non-donor partner having the ability to control the foundation’s distributions received from the CLT.

9. **Trustee Related Provisions.** If one partner has a trust established for their benefit (by their parents, for example) and is serving as Trustee, distributions must be limited to the partner’s health, education, support, and maintenance to keep the assets out of the partner’s estate.

   a. If they appoint a successor or Co-Trustee who is not a related or subordinate party, distributions do not have to be limited to that ascertainable standard.

   b. A partner who is not recognized under federal law as the beneficiary partner’s spouse is not a related or subordinate party, and could be appointed by the beneficiary partner to broaden the trust’s distribution standards.

10. **Private Foundations.** Same-sex partners are not considered related, so a partner of a substantial contributor will not automatically be treated as a “disqualified person” as a result of the relationship. As a result, the partner is not, by nature of the relationship, subject to the various excise taxes associated with private foundations, including those for self-dealing.

C. **Cohabitation Agreements.** Unmarried couples have long been able to enter contractual agreements that define rights, duties, obligations, responsibilities, and legal aspects of the relationship.

   1. Similar to a prenuptial agreement, a cohabitation agreement can cover issues such as:

      a. how expenses will be handled;

      b. how income is shared or separated;

      c. the method and funding of acquisition and title to assets;

      d. the disposition of assets in the event the relationship terminates; and

      e. dispute resolution between the parties.

   2. Unlike a prenuptial agreement, which only goes into effect in the event the couple marries, the cohabitation agreement would generally be effective
upon execution and would remain in effect until either party’s death or termination of the relationship (however that is defined in the agreement)
I. INTRODUCTION

Many families have special real estate that needs to be dealt with upon death including farm land, cabin/cottage property, and hunting land. Many clients wish for these types of property to stay in the family for generations to come. Handling this type of real estate takes special planning and communication with the next generation during the creation of an estate plan.

II. REASONS FOR THE CREATION OF A SUCCESSION PLAN FOR THE FAMILY PROPERTY

A. COMMON PROBLEMS WITH OUTRIGHT OWNERSHIP OF REAL PROPERTY BY UNMARRIED INDIVIDUALS

1. Creditor claims
2. No restrictions on transfers
3. Difficulty in making decisions on managing the property
4. Simply put-no rules for ownership leaving the legal remedy to resolve disputes being partition actions

B. LEGAL REMEDY FOR DISPUTES: PARTITION

1. If individuals who jointly own property disagree about an issue involving the real property and the disagreement cannot be resolved, a co-owner’s legal remedy is to seek a partition action.

2. Partition actions are just similar to no-fault divorces because, in the absence of a settlement, the result of the action is either a physical division of the property or a sale of the property at public auction, regardless of the actions of the co-owners.

3. The statutes regarding partition actions are found in Wis. Stats. Ch. 842.
III. PROCESS FOR HANDLING THE SPECIAL FAMILY PROPERTY

A. STEP ONE IN CREATING THE FAMILY PROPERTY SUCCESSION PLAN: FAMILY DISCUSSION

Many clients come to meetings and want to leave the special property to all children in their will or revocable trust. However, very few have even asked their children if they want to own the property. We encourage clients to sit down with their children and be honest about what it means to own the property both from a time perspective and from a financial perspective. Sample topics to be included in the conversation:

1. The original owners’ concerns and goals in transferring the property to future generations need to be discussed. If future generations do not understand the original owners’ concerns, there may be disagreement regarding how to structure the family property succession plan.

2. The original owners also need to discuss the concerns of future generations in co-owning the property and determine whether their concerns can be addressed by a succession plan.

3. What are the annual expenses for the property? Will the current owners establish a fund for the payment of annual expenses for the benefit of the future owners?

4. What are expenses expected to be like in the future? Are there any major capital expenses that will likely require substantial funds in the future?

5. What is the annual maintenance for the property? In other words, are there responsibilities other than financial responsibilities associated with the property?

The first step is necessary to determine whether future generations have similar intentions with regard to future ownership of the property. If so, the details of the plan should be discussed.

B. STEP TWO: HOW AND WHEN TO GIVE THE PROPERTY

1. Some clients prefer to give the property to their children while they are living. In that case we typically transfer the property to a limited liability company and transfer the membership units to the children.

2. Most clients prefer to continue to own the property during their lifetime. In that case, we address who the property will
be passed to and how it will be passed to them in their estate planning documents.

3. We never recommend transferring the real estate to children either during lifetime or at death without providing the children with a framework for the ownership and management of the property.

4. Trust – Wis. Stats. Ch. 701

   a. Decisions To Make On Managing The Property.

      (1) When it comes to the family property, the client needs to think about who will serve in the trustee role with regard to the separate trust that manages the family property.

      (2) How will trustee decisions be made, majority, super-majority, unanimous, etc?

      (3) Can a trustee appoint his or her successor? If not, what happens if a trustee is unable to serve as trustee?

      (4) What powers does the trustee have with regard to the property? May the trustees sell the property without the consent of the beneficiaries? Can they mortgage the property? Can they buy tangible personal property for the property?

   b. Beneficiaries Rights and Responsibilities.

      (1) What right to the beneficiaries of the trust have to use the property? Are they guaranteed a certain amount of time to be determined by the trustee? Are they guaranteed a certain amount of time under some other process?

      (2) Do the beneficiaries have to pay a rental fee to use the property? Do the beneficiaries have to provide some sort of sweat equity when they are at the property?

      (3) Are the beneficiaries involved in any decision making if they are not trustees? Are they involved in appointing trustees?
c. Payment of Expenses.

(1) Clients should consider leaving a trust fund to help pay for expenses associated with the property.

(2) If clients do not leave a trust fund and beneficiaries have to pay for expenses of the property, the beneficiaries will likely be considered settlors of the trust. This will affect the creditor protection provided by the trust under Ch. 701.

(3) The document should address what happens if a beneficiary does not pay for his/her share of expenses.

d. What if a Beneficiary No Longer Wants The Property Or Wants To Transfer His or Her Interest

(1) Transfer during lifetime for no consideration: could be done via power of appointment. However, be careful on drafting the power of appointment as provided in Ch. 701 so that the beneficiary is not considered a settlor of the trust.

(2) Transfer upon death: could be done via a power of appointment but the document should also indicate who the default taker is.

(3) Transfer during lifetime for cash: if a beneficiary wishes to convert his or her interest to cash, the trust needs to be carefully drafted to avoid having the beneficiary be considered a settlor of the trust for creditor protection purposes.

e. The Wisconsin Trust Code-Ch. 701 makes it more difficult to achieve creditor protection while giving the beneficiaries of a trust that same rights they would have as members of a LLC.

f. We only use trusts if we want individuals in the next generation to simply have the right to use the property but not necessarily a lot of decision making authority with regard to the property or the right to change their beneficial interest through a sale or transfer.
5. **LLC** – Wis. Stats. Ch. 183

a. Ownership interest in an LLC is called a membership interest. The members have liability protection.

b. Structure can be amended by members much more simply than a trust under Ch. 701 especially if all members do not have to be involved in that process.

c. Our typical planning process is for the client to transfer the property to the LLC during their lifetime and then transfer the LLC to designated children in their estate planning documents.

d. The rules for owning and managing the property are including in the LLC operating agreement which is created with input of the clients and the future generation that will own.

e. The members are now owners of a business versus having a beneficial right to property.

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IV. **DRAFTING THE OPERATING AGREEMENT**

A. **THE DECISION MAKERS: MEMBERS, BOARD OF MANAGERS, AND MANAGERS**

1. As the property continues to be owned by future generations, there will likely be more and more owners. Management would be very difficult if all owners had a voice in the affairs of the LLC. To limit the number of decision makers and to streamline the operations of the LLC, we recommend the use of managers and the family unit concept. This concept is easier to carry out in the operating agreement than in a trust.
Family Unit Concept: Utilizing family units makes it easier to collect on assessments for annual expenses, to schedule the use of the property, and to make major decisions on ownership and management of family property when many owners are involved. Example: Fred and Mary are the original owners of family property in Minocqua. They want to transfer their interests in the property to two children, Steve and Sally. Steve has three children who will eventually become owners and Sally has two children who will become owners. The family units are structured as follows:

Fred - Original Owner
Mary - Original Owner
Steve
  Child 1
  Child 2
  Child 3
Sally
  Child 1
  Child 2

2. **Board of Managers**: The members of the Board of Managers collectively manage the business and affairs of the LLC. They make the majority of the LLC decisions. In the above example, Fred, Mary, Steve and Sally would serve as the original Board of Managers until they are unwilling or unable to serve or are no longer members of the LLC.

3. **Managers**: The Board of Managers appoints individuals to carry out the following day-to-day activities for the LLC:
   a. Financial Manager
   b. Repair and Maintenance Manager

4. **Members**: Some decisions are left to the members, but those decisions typically only require majority approval or supermajority approval. Some of the decisions that are left to all members include whether to buy or sell real property in the name of the LLC, terminate the LLC, amend the operating agreement, and whether or not to approve a transfer of an LLC interest to someone other than a permitted transferee.
B. PAYMENT OF ANNUAL EXPENSES FOR THE PROPERTY

1. Again, clients may leave a trust fund or cash in the LLC for the next owners. Problems commonly occur when individuals with different asset and income levels co-own property together.

2. In the absence of a separate fund to pay for LLC expenses, a budget needs to be created to assess individual members or Family Units for their share of annual expenses. Once the budget is determined, each Family Unit is assessed its share of the annual expenses.

3. What if a Family Unit does not pay its share of the expenses?
   a. Interest is typically assessed on unpaid amounts.
   b. A grace period is usually given in the event a Family Unit is experiencing financial trouble.
   c. During this time, the Family Unit’s use of the family property is typically suspended.
   d. Eventually, the other owners and the LLC are given options to purchase the defaulting Family Unit’s assessments at a discounted value. Given the Family Unit concept, a default is not likely to occur.

C. TRANSFER OF MEMBERSHIP INTERESTS

1. It is much more difficult to transfer the next generation’s interest in a family property if it is a beneficial interest in a trust and maintain creditor protection. Most operating agreements permit transfers under the following circumstances:
   a. To permitted transferees;
   b. With the consent of Family Units or members; and
   c. After option periods have expired.

2. Transfers At Death: If an owner passes away with a surviving spouse, some operating agreements provide the spouse with the opportunity to use the property in exchange for a user’s fee, even if the spouse is not an owner of the property.

D. PURCHASE PRICE
1. An operating agreement also provides a mechanism for the
determination of the purchase price of any membership
interest sold pursuant to the terms of the operating agreement.

2. Price could be determined by appraisal.

3. Price also could be determined based upon the most recent
real property tax statement. This method is usually not
recommended because of inaccuracies.

4. Agreed upon price: If the members are going to agree to the
price, the operating agreement should specify that they will
agree to the fair market value of the property at least every
other year, and incorporate a fall-back provision for
determining value, in case the members fail to agree upon the
value in accordance with the established schedule.

5. Some families utilize discounts to make sure the family
property continues to be owned by family members and to
discourage owners from viewing the LLC as a source of funds.
In addition, family properties can be expensive and many
founders want owners actively involved in the LLC to be able
to afford to buy out a member who is no longer interested in
owning an interest in the LLC.

6. The operating agreement usually specifies the payment terms
if a member’s interest will be purchased by other members or
the LLC. Typically, 20% must be paid at closing and the
balance may be paid over time (e.g., 5, 10, or 15 years).
Interest must be paid on any amounts not paid at closing, or
the IRS will impute income interest to the purchasing member
even though no interest payments are being made.

E. MECHANISM TO RESOLVE DISPUTE

1. What if there are disputes between the members of the Board
of Managers? What is the mechanism to resolve the dispute?

2. Most families choose to appoint a Special Manager who is not
a member of the LLC to provide a tie-breaking vote on any
disputed matter that cannot be resolved.

3. Some families require the issue to be submitted to mediation
or arbitration.

4. In the event that there are only two owners of the LLC, some
families prefer to allow a member to name a price for the
purchase of a 50% interest in the LLC. The other member has
a choice of either selling his or her interest at the specified price or buying the member’s interest for the designated price.

V. CONCLUSION
OPERATING AGREEMENT
OF
XYZ, LLC
# TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>ARTICLE 1 - INTRODUCTION</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Section 1.1 Initial Members And Parties To Agreement</td>
<td>1</td>
</tr>
<tr>
<td>Section 1.2 Name</td>
<td>1</td>
</tr>
<tr>
<td>Section 1.3 Term</td>
<td>1</td>
</tr>
<tr>
<td>Section 1.4 Purpose</td>
<td>1</td>
</tr>
<tr>
<td>Section 1.5 Powers Of The LLC</td>
<td>1</td>
</tr>
<tr>
<td>Section 1.6 Registered Agent And Office</td>
<td>1</td>
</tr>
<tr>
<td>Section 1.7 Ownership Of LLC Property</td>
<td>1</td>
</tr>
<tr>
<td>Section 1.8 Members Do Not Have Agency Powers</td>
<td>2</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>ARTICLE 2 - MEMBERSHIP INTERESTS, CAPITAL CONTRIBUTIONS, AND CAPITAL ACCOUNTS</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Section 2.1 Membership Interests</td>
<td>2</td>
</tr>
<tr>
<td>Section 2.2 Return Of Capital</td>
<td>2</td>
</tr>
<tr>
<td>Section 2.3 Capital Accounts</td>
<td>2</td>
</tr>
<tr>
<td>Section 2.4 Interpretation</td>
<td>2</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>ARTICLE 3 - PROFITS, LOSSES, AND CASH FLOW</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Section 3.1 Profits And Losses</td>
<td>3</td>
</tr>
<tr>
<td>Section 3.2 Minimum Distributions To Cover Members’ Income Tax Liability</td>
<td>3</td>
</tr>
<tr>
<td>Section 3.3 Distributions Of Net Cash Flow</td>
<td>3</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>ARTICLE 4 - FAMILY UNITS AND MANAGEMENT</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Section 4.1 Family Units</td>
<td>4</td>
</tr>
<tr>
<td>Section 4.2 Authority Of The Board Of Managers</td>
<td>5</td>
</tr>
<tr>
<td>Section 4.3 Powers Of The Board Of Managers</td>
<td>5</td>
</tr>
<tr>
<td>Section 4.4 Financial Manager</td>
<td>6</td>
</tr>
<tr>
<td>Section 4.5 Property Maintenance Manager</td>
<td>9</td>
</tr>
<tr>
<td>Section 4.6 Compensation</td>
<td>9</td>
</tr>
<tr>
<td>Section 4.7 Deadlock Provisions</td>
<td>10</td>
</tr>
<tr>
<td>Section 4.8 Members’ Purchase Rights On Sale Of Real Property</td>
<td>10</td>
</tr>
<tr>
<td>Section 4.9 Rights Of Nonmanaging Members</td>
<td>11</td>
</tr>
</tbody>
</table>
## ARTICLE 5 - ADMISSION, REMOVAL, AND TRANSFERS OF INTERESTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Topic</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>5.1</td>
<td>Admission</td>
<td>12</td>
</tr>
<tr>
<td>5.2</td>
<td>Removal</td>
<td>12</td>
</tr>
<tr>
<td>5.3</td>
<td>Transfers Of Membership Interests With Consent</td>
<td>12</td>
</tr>
<tr>
<td>5.4</td>
<td>Transfer Of Membership Interests to Permitted Transferees</td>
<td>12</td>
</tr>
<tr>
<td>5.5</td>
<td>Other Transfers Of Membership Interests</td>
<td>12</td>
</tr>
<tr>
<td>5.6</td>
<td>Purchase Price</td>
<td>13</td>
</tr>
<tr>
<td>5.7</td>
<td>Payment Terms</td>
<td>13</td>
</tr>
<tr>
<td>5.8</td>
<td>The Closing</td>
<td>14</td>
</tr>
<tr>
<td>5.9</td>
<td>Donee’s Put Right To Qualify Gifts For Annual Exclusion</td>
<td>14</td>
</tr>
<tr>
<td>5.10</td>
<td>Purchase On Death Of A Member</td>
<td>14</td>
</tr>
</tbody>
</table>

## ARTICLE 6 - DISSOLUTION

<table>
<thead>
<tr>
<th>Section</th>
<th>Topic</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>6.1</td>
<td>Causes Of Dissolution</td>
<td>15</td>
</tr>
<tr>
<td>6.2</td>
<td>Continuation</td>
<td>15</td>
</tr>
<tr>
<td>6.3</td>
<td>Upon Dissolution</td>
<td>15</td>
</tr>
<tr>
<td>6.4</td>
<td>Gain Or Loss</td>
<td>16</td>
</tr>
<tr>
<td>6.5</td>
<td>LLC Assets Sole Source</td>
<td>16</td>
</tr>
</tbody>
</table>

## ARTICLE 7 - MARITAL PROPERTY INTEREST OF A MEMBER’S SPOUSE

<table>
<thead>
<tr>
<th>Section</th>
<th>Topic</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>7.1</td>
<td>Limitation On Spouse’s Rights As Member</td>
<td>16</td>
</tr>
<tr>
<td>7.2</td>
<td>Married Member’s Option To Purchase</td>
<td>16</td>
</tr>
<tr>
<td>7.3</td>
<td>Member’s Option To Purchase</td>
<td>17</td>
</tr>
<tr>
<td>7.4</td>
<td>LLC’s Option To Purchase</td>
<td>17</td>
</tr>
<tr>
<td>7.5</td>
<td>Purchase Price And Terms Of Payment</td>
<td>18</td>
</tr>
<tr>
<td>7.6</td>
<td>Extension Of Time Periods</td>
<td>18</td>
</tr>
</tbody>
</table>

## ARTICLE 8 - MISCELLANEOUS

<table>
<thead>
<tr>
<th>Section</th>
<th>Topic</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>8.1</td>
<td>Notices</td>
<td>18</td>
</tr>
<tr>
<td>8.2</td>
<td>Personal Property</td>
<td>18</td>
</tr>
<tr>
<td>8.3</td>
<td>Amendment</td>
<td>18</td>
</tr>
<tr>
<td>8.4</td>
<td>Partition</td>
<td>18</td>
</tr>
<tr>
<td>8.5</td>
<td>No Waiver</td>
<td>18</td>
</tr>
<tr>
<td>8.6</td>
<td>Number And Gender</td>
<td>18</td>
</tr>
<tr>
<td>8.7</td>
<td>Applicable Law</td>
<td>19</td>
</tr>
<tr>
<td>8.8</td>
<td>Severability</td>
<td>19</td>
</tr>
<tr>
<td>8.9</td>
<td>Good Faith</td>
<td>19</td>
</tr>
<tr>
<td>8.10</td>
<td>Successors And Assigns</td>
<td>19</td>
</tr>
</tbody>
</table>
OPERATING AGREEMENT
OF
XYZ, LLC

ARTICLE 1 - INTRODUCTION

Section 1.1 Initial Members And Parties To Agreement. This operating agreement of XYZ, LLC (the “LLC”) is dated for identification purposes as of March 24, 2016, and is entered into by Fred Smith and Mary Smith (hereinafter a “member”).

Section 1.2 Name. The name of the company is XYZ, LLC.

Section 1.3 Term. The term of the LLC began upon acceptance of its Articles of Organization by the Wisconsin Department of Financial Institutions and shall end when terminated as provided in Article 6.

Section 1.4 Purpose. The members join together to form a limited liability company pursuant to Chapter 183 of the Wisconsin Statutes and the terms of this agreement. The members believe that the formation of the LLC will facilitate the administration of their common ownership of real and personal property, and their dealings with third parties, and facilitate the transition of the management and ownership of the LLC’s assets to younger generations of the members' family. The members desire to impose certain restrictions and obligations on the existing members and future members by this agreement, which the members believe will benefit the LLC by allowing it to continue the management and use of its assets without interference from unrelated third parties.

Section 1.5 Powers Of The LLC. The LLC shall have the power and authority to take any and all actions necessary, appropriate, proper, advisable, incidental, or convenient to or for the furtherance of the purpose set forth in Section 1.4, as determined by the Board of Managers.

Section 1.6 Registered Agent And Office. The initial registered agent of the LLC shall be Fred Smith. The initial registered office of the LLC shall be located at 123 Paradise Drive, Minocqua, Wisconsin. The Board of Managers may appoint a new registered agent and/or change the registered office at any time. Upon the appointment of a new registered agent or the change of the registered office, the Financial Managers shall promptly file a statement of change as required by Wis. Stat. § 183.0105.

Section 1.7 Ownership Of LLC Property. The LLC may acquire, hold, convey, mortgage, encumber, and otherwise deal with in any legal manner, real and personal property in the LLC’s name. All property originally transferred to or subsequently acquired by or on behalf of the LLC is property of the LLC and not of the members individually. Property acquired with LLC funds is presumed to be LLC property.
Section 1.8  Members Do Not Have Agency Powers. No member, solely by virtue of being a member, is an agent of the LLC, or of the Board of Managers, or of the other members, or of any other member. No member, solely by virtue of being a member, has the power or ability to bind the LLC with respect to any aspects of the LLC’s business.

ARTICLE 2 - MEMBERSHIP INTERESTS, CAPITAL CONTRIBUTIONS, AND CAPITAL ACCOUNTS

Section 2.1  Membership Interests. The members and their respective membership interests are set forth on Appendix A attached to this agreement.

Section 2.2  Return Of Capital. No member is entitled to withdraw from the LLC, to receive a return of any part of the member’s capital contribution, to receive any distribution, or to receive a repayment of any balance in the member’s capital account, as defined in Section 2.3, except as expressly provided in this agreement. No member has the right to demand that distributions be in kind. No member will be paid interest on any capital contribution or on the member’s capital account.

Section 2.3  Capital Accounts. There shall be established and maintained with respect to each member a capital account in accordance with the following:

(a) Each member’s capital account shall be increased by (i) the member’s capital contribution, (ii) the member’s allocable share of profits under Article 3, and (iii) the amount of any debt of the LLC that is assumed by the member or that is secured by any property distributed to the member.

(b) Each member’s capital account shall be decreased by (i) the amount of cash and the asset value of any property distributed to the member, (ii) the member’s allocable share of losses under Article 3, and (iii) the amount of any debt of the member that is assumed by the LLC or secured by any property contributed by the member to the LLC.

(c) In the event any member transfers all or any part of the member’s percentage interest in accordance with the terms of this agreement, the transforee shall succeed to the capital account of the transferor to the extent the capital account relates to the transferred percentage interest.

Section 2.4  Interpretation. The provisions of Section 2.3 and the other provisions of this agreement relating to the maintenance of capital accounts are intended to comply with Section 1.704-1(b) of the Treasury Regulations, the terms and requirements of which are incorporated in this agreement by reference, and shall be interpreted and applied in a manner consistent with those terms and requirements.
ARTICLE 3 - PROFITS, LOSSES, AND CASH FLOW

Section 3.1  Profits And Losses.

(a) The LLC’s net profits and losses (and each item of income, deduction, gain, loss, and credit that makes up net profits and losses) shall be computed in accordance with generally accepted accounting principles, consistently applied, and shall be allocated among the members in proportion to their respective membership percentage interests.

(b) Notwithstanding the general rule stated in subsection (a), any income, gain, loss, and deduction with respect to property contributed to the LLC by a member shall be shared among the members so as to take account of any variation between the basis and the fair market value of the contributed property at the time of the contribution, in accordance with any applicable U.S. Treasury regulations.

(c) When a member transfers his or her membership interest, profits and losses shall be allocated among the members based on the number of days (defined below) in that year during which each member owned a membership interest, or on any other reasonable basis selected by the Board of Managers, consistent with applicable U.S. tax laws and regulations.

Section 3.2  Minimum Distributions To Cover Members’ Income Tax Liability. The Board of Managers shall make distributions to the members with respect to each calendar year in an amount that will enable each member or former member, as appropriate, to pay the federal and state income taxes on his or her proportionate share of the LLC’s net income for that calendar year. These distributions, with respect to each such calendar year, shall be payable to the members and former members, as appropriate, within ninety (90) days after the end of the calendar year and shall be in an amount reasonably estimated by the LLC’s independent certified public accountants to be sufficient to meet the members’ obligations for taxes attributable to the LLC’s net income for the year to which the taxes relate. In estimating the amount deemed sufficient to meet the members’ tax obligations, the LLC’s certified public accountants shall use the highest applicable federal and state tax rates for the members, but shall take into account the deductibility of state income taxes for federal income tax purposes. All distributions shall be made to each member in proportion to his or her membership interest percentage.

Section 3.3  Distributions Of Net Cash Flow. In addition to the distributions that are required to be made under Section 3.2, the Board of Managers may, in their sole discretion, make distributions of the LLC’s net cash flow (defined below). Net cash flow, if and when distributed, shall be distributed to each member in proportion to his or her membership interest percentage. No member may make any demand with respect to a distribution.
ARTICLE 4 - FAMILY UNITS AND MANAGEMENT

Section 4.1 Family Units. A Family Unit shall be created for each individual identified in Section 1.1 and for each child of theirs to whom they transfer a membership interest during their lifetime or at death. If the initial members specified in Section 1.1 transfer their membership interests to a descendant, other than a child, or if a child transfers a membership interest to his or her descendant, such descendant shall be included in the Family Unit of the initial member’s child of which the transferee is a lineal descendant. For example, if Fred and Mary transfer their interests to the children of their son Steve, all of such children shall be included in one Family Unit along with any interest transferred to Steve.

(a) Each Family Unit shall, by majority vote of its adult members, appoint one person to serve on the Board of Managers. Each person so appointed shall continue to serve on the Board of Managers until death, incapacity (as defined below), removal, or resignation. Each person serving on the Board of Managers may at any time designate a person to be his or her successor upon his or her death, incapacity, or resignation. The designation of a successor member of the Board of Managers shall be in writing and substantially in the form of Appendix B to this agreement. Any designation may be revoked or amended by a subsequent designation that complies with the above formalities. If a conflict occurs between the terms of two or more designations, the most recent designation shall prevail.

(b) Upon the death, resignation, or incapacity of a person serving on the Board of Managers who did not designate a successor as provided in subsection (a) above, the adult members of that individual’s Family Unit shall have the right for a period of ninety (90) days after such event to designate a successor by majority vote. In addition, the adult members of a Family Unit may remove their representative from the Board of Managers with or without cause at any time by majority vote, in which case the adult members of the Family Unit shall have the right for a period of ninety (90) days after written notice to all members of such removal to designate a successor.

(c) A trustee of a trust (whether revocable or irrevocable) that holds a membership interest in the LLC may be designated by the adult members of a Family Unit as a member of the Board of Managers. If such a trustee is acting as a member of the Board of Managers or the Financial Manager or Property Maintenance Manager by virtue of being trustee, and such trustee ceases to serve as trustee, such trustee’s successor as trustee shall automatically succeed such trustee as a member of the Board of Managers or the Financial Manager or Property Maintenance Manager and such succession shall not be deemed to be a transfer of a membership interest in the LLC. Further, if such a trustee is acting as a member of the Board of Managers, the Financial Manager or the Property Maintenance Manager by virtue of being trustee, and such trust is divided into two or more subtrusts, the trustee of such subtrusts shall automatically succeed such trustee as a member of the Board of Managers, the Financial Manager, or the Property Maintenance Manager and such succession shall not be deemed to be a transfer of a membership interest in the LLC.
Section 4.2 Authority Of The Board Of Managers. The business and affairs of the LLC shall be managed by a Board of Managers comprised of the individuals designated as provided in Section 4.1. The Board of Managers shall have the sole and exclusive responsibility for the operation of the LLC. Decisions of the Board of Managers shall be made by majority vote, except that the following decisions shall require an affirmative vote of the members holding at least seventy-five percent (75%) of the membership percentages then outstanding:

(a) The decision to sell all or substantially all of the real property of the LLC;

and

(b) The decision to dissolve the LLC or amend the LLC Operating Agreement.

Section 4.3 Powers Of The Board Of Managers. The Board of Managers shall have all necessary powers to carry out the purposes of the LLC. Without limiting the generality of the foregoing but subject to the obligation of the Board of Managers to obtain any required consent of the members as provided in Section 4.2, the Board of Managers shall have all powers required or appropriate to manage the business and affairs of the LLC, including the following:

(a) Incur or assume indebtedness or other obligations for the LLC’s business;

(b) Issue promissory notes and other debt instruments (negotiable or nonnegotiable), in any amounts and secured by any encumbrance on all or any part of the LLC’s assets;

(c) Assign any debts owing to the LLC;

(d) Engage in any other means of financing;

(e) Enter into any agreement for sharing of profits and any joint venture agreement with any person or entity engaging in any business or venture in which this LLC may engage;

(f) Subject to the suspension of use discussed in Section 4.4 and any lease of the LLC property as provided in subsection (g), the Board of Managers shall create a schedule for the use of the LLC real property by members of the Family Units (which use shall include the right to have guests and pets on the property);

(g) Manage, administer, conserve, improve, develop, operate, lease, utilize, and defend the LLC’s assets, directly or through third parties; leases may be to such persons, whether or not they are members, for such lease terms and for such rents as the Board of Managers may negotiate from time to time; and the rights of tenants to occupy the LLC’s property under valid lease agreements shall control over the use rights of the members;
(h) Employ all types of agents and employees (including lawyers and accountants), even if they are related by blood, marriage, or business relationship to a member of the Board of Managers, and pay them reasonable compensation;

(i) Buy or otherwise obtain the use of any type of equipment or other property that may be convenient or advisable in connection with any LLC business;

(j) Sue and be sued, complain and defend in the LLC’s name and on its behalf;

(k) Approve or amend the budget prepared by the Financial Manager as provided in Section 4.4;

(l) Approve any unexpected repairs or maintenance to the real property of the LLC as specified by the Property Maintenance Manager under Section 4.5;

(m) Make all elections available to the LLC under the Internal Revenue Code; provided, however, that at the request of any member, the LLC shall make an election under Section 754 of the Internal Revenue Code, if such requesting member pays the additional bookkeeping and accounting costs which result from such election, in which case each member shall supply to the LLC the information necessary to properly give effect to such election;

(n) Quitclaim, release, or abandon any LLC assets with or without consideration; and

(o) Engage in all other business consistent with the purpose of the LLC.

Section 4.4 Financial Manager. The initial Financial Manager of the LLC shall be set forth in Appendix A. Thereafter, any vacancies in the position of the Financial Manager shall be filled by the Board of Managers. The Financial Manager shall continue to serve until death, incapacity, resignation, or removal.

(a) The Financial Manager shall have the full and exclusive power on the LLC’s behalf to do or cause to be done anything deemed necessary or appropriate for the LLC’s financial and legal business as designated by the Board of Managers. To the extent the Board of Managers does not delegate any additional powers or authority to the Financial Manager, the Financial Manager shall have, at the minimum, the following powers and authority.

(1) Annual Budget. The Financial Manager shall by February 1 of each year prepare a budget for the operation, upkeep, and maintenance of the LLC property including but not limited to the funds for repairs and maintenance of LLC property, funds for necessary capital expenditures, taxes, insurance, utilities, fees, maintenance of a reasonable reserve fund, and furniture and home furnishings. The budget shall be prepared with input from the Property Maintenance Manager regarding anticipated expenses for repairs and maintenance
to the LLC property. The budget shall be delivered to the Board of Managers along with a list of the income and disbursements for the previous year by February 1 of each year.

(2) Assessments. In accordance with the final budget as approved by the Board of Managers, the Financial Manager shall assess each Family Unit a portion of the total amount of funds needed for the LLC based upon the proportional ownership interest in the LLC of the members in a Family Unit. The Financial Manager shall deliver the assessment to the Family Units by April 1 of each year. Each Family Unit shall decide how the assessment is to be satisfied among the members of the Family Unit. All assessments must be paid by the Family Unit to the Financial Manager within thirty (30) days of delivery of the assessment. Payment of an annual assessment shall be deemed to be a contribution to the capital of the LLC. If a Family Unit fails to pay its share of an assessment as provided above, use of the LLC real property and tangible personal property by any member of that Family Unit shall be suspended until the Family Unit pays all amounts due and outstanding to the Financial Manager plus interest at the mid-term applicable federal rate for federal income tax purposes. During such suspension, the Board of Managers (excluding any persons who are members of the delinquent Family Unit) may, in their absolute discretion, formulate and offer the members of the delinquent Family Unit an alternative resolution to paying the assessments. The amount owed by the delinquent Family Unit shall be deducted from any distributions of profit to the members in the Family Unit and from the Family Unit’s member’s share of the net proceeds of sale of the LLC property, whether upon dissolution of the LLC or at any earlier time.

(3) Books And Records. The Financial Manager shall maintain books and records for the LLC at the LLC’s principal office or at any other place designated by the Board of Managers. The books and records shall be available for inspection and copying by any member or any member’s duly authorized representative(s), at the member’s own expense. The LLC’s books and records shall include, but not be limited to, the following:

(A) A list, in alphabetical order, of the full name of each past and present member, member of the Board of Managers, the Financial Manager, and the Property Maintenance Manager, along with last known mailing addresses, the date on which the member or manager became a member or manager and, if applicable, the date on which the member or manager ceased to be a member or manager;

(B) A copy of the LLC’s Articles of Organization and any amendments thereto, along with a copy of any power of attorney under which the LLC’s Articles of Organization, or amendments thereto, have been executed;

(C) A copy of the LLC’s Operating Agreement, any amendments thereto, and any Operating Agreements no longer in effect, along with a copy of any power of attorney under which any of the LLC’s Operating Agreements, or amendments thereto, have been executed;
(D) Copies of all financial statements and tax returns that were required to be prepared on behalf of the LLC for the lesser of (i) the preceding four (4) calendar years or (ii) the number of calendar years the LLC has been in existence; and

(E) Records that relate to:

(i) Each member’s contributions to the LLC made pursuant to this agreement;

(ii) The times at which, or the events upon which, any member agreed to make any additional contributions to the LLC;

(iii) The outcome of all votes taken by members or the Board of Managers pursuant to this agreement; and

(iv) Other matters that the members reasonably believe have, or might have, an effect on the members.

(4) Furnishing Tax Information To Members. As soon as practicable after the close of each calendar year, but in no event later than sixty (60) days after the end of such year, the Financial Manager shall deliver to each member a financial report of the LLC for such calendar year. The report shall include: (i) distributions to the members and allocations to the members of LLC taxable income, gains, losses, deductions, credits and items of tax preference; (ii) all necessary tax reporting information required by the members for preparation of their respective income tax returns; and (iii) upon request, a copy of the tax returns (federal, state and local, if any) of the LLC for such calendar year.

(5) Bank Accounts. All funds of the LLC shall be deposited and maintained in such bank account or accounts titled in the LLC name as may be determined by the Financial Manager and may be withdrawn on the signature of the Financial Manager or such other person or persons as the Board of Managers may authorize. The Financial Manager shall pay for all expenses associated with the LLC property from the funds of the LLC, including but not limited to:

(A) Insurance (property and casualty) with specified coverage and limits at a minimum of limits required under the applicable laws and regulations but not less than ninety percent (90%) of replacement value of covered property for fire and extended coverage insurance, and liability insurance in amounts equal to industry standards for the property owned by the LLC;

(B) Taxes, encumbrances, and assessments;

(C) Utilities, including but not limited to water and sewer, electricity, and heat; and
(D) Repairs, maintenance, and capital expenditures (as approved by the Board of Managers).

(6) The Financial Manager shall be the tax matters member and, as such, shall be solely responsible for representing the LLC in all dealings with the U.S. Internal Revenue Service and any state, local, and any foreign tax authorities. The tax matters member shall keep the other members reasonably informed of any LLC dealings with any tax agency.

Section 4.5 Property Maintenance Manager. The initial Property Maintenance Manager of the LLC shall be set forth in Appendix A. Thereafter, any vacancies in the position of the Property Maintenance Manager shall be filled by the Board of Managers. The Property Maintenance Manager shall have the full and exclusive power on the LLC’s behalf to do or cause to be done anything deemed necessary or appropriate for the maintenance of the LLC’s property as designated by the Board of Managers. In addition to any powers or authority delegated to the Property Maintenance Manager by the Board of Managers, the authority of the Property Maintenance Manager includes the following:

(a) The Property Maintenance Manager shall maintain the real and tangible personal property in its current condition, including maintenance of the roof, plumbing, electrical, and HVAC systems, floor, wall and window coverings, lighting, appliances, and capital improvements.

(b) The Property Maintenance Manager may perform repairs or maintenance on the property in amounts less than Five Hundred Dollars ($500), provided, however, such repair or maintenance complies with the annual budget discussed above. Notwithstanding the foregoing, the Property Maintenance Manager may have repairs or maintenance performed on the property in excess of Five Hundred Dollars ($500) if needed on an emergency basis or if approved by the Board of Managers in the annual budget or any time thereafter.

(c) The Property Maintenance Manager shall provide a list of tasks and duties for members to complete while using the property in order to prepare the real property for the next member’s use. If a member does not perform a task and duty as provided on the list, the Property Maintenance Manager shall have the right to hire an independent contractor to perform such tasks and duties and the Family Unit of the nonperforming member shall be assessed the expense the following year. Furthermore, any damage to the LLC’s property that is attributable to a member’s use of the LLC’s property, including, but not limited to, damage caused by a pet or guest of a member, shall be the sole responsibility of the Family Unit of the member. Any such damages or failure to perform assigned tasks attributable to a certain Family Unit shall be paid by such Family Unit or assessed to such Family Unit in the following year.

Section 4.6 Compensation. The members of the Board of Managers, the Financial Manager, and the Property Maintenance Manager shall not receive compensation for management of the LLC but may receive reimbursement for out-of-pocket expenses.
Section 4.7 Deadlock Provisions. If there are an even number of members of the Board of Managers and they cannot obtain a majority vote as to any issue affecting the LLC, a “Deadlock” shall exist. In the event of such a Deadlock, the Board of Managers shall designate a Special Manager. If the Board of Managers is unable to designate a Special Manager, each member of the Board of Managers shall appoint an individual, who may or may not be a member of the LLC, to serve on a committee to choose a Special Manager. Such committee shall appoint a Special Manager by majority vote. The Special Manager shall vote on the Deadlock issue and decide the matter on behalf of the Board of Managers. A Special Manager shall not be a member of the LLC at the time of his or her appointment. A Special Manager shall not be liable for the management of the LLC or for exercising or not exercising a voting power under this agreement, unless such exercise or non-exercise involves willful misconduct or gross negligence. A Special Manager shall be entitled to be indemnified and held harmless by the LLC and shall be entitled to receive reasonable compensation for services rendered.

Section 4.8 Members’ Purchase Rights On Sale Of Real Property.

(a) In the event the members of the LLC decide to sell all or substantially all of any real property owned by the LLC, the Financial Manager shall have the fair market value of the real property determined by a licensed real estate appraiser who is regularly engaged in rendering appraisals of comparable property to lending institutions in the county where the property is located. The Financial Manager shall give written notice of the results of the appraisal to all members, which shall constitute an offer to sell the real property to the members for such fair market value and to sell the personal property located in and around the real property to the members for an amount determined by the Board of Members in their exercise of sole and absolute discretion. The terms of such sale shall be cash at closing. Within sixty (60) days of receiving such notice, any interested member or group of members shall give the Financial Manager written notice of his, her or their election to exercise this option.

(b) If the Financial Manager does not receive a timely notice of election under subsection (a) above, the LLC may proceed to sell such real property and sell or otherwise dispose of the LLC’s personal property without regard to this Section.

(c) If the Financial Manager receives more than one such notice of election, the Financial Manager promptly shall give written notice to each electing member or group of members that he, she or they may within fifteen (15) days of such notice agree to purchase the property jointly. If the electing members cannot agree to purchase the property jointly, the Financial Manager shall promptly give written notice to the electing members that he, she or they may within fifteen (15) days of such notice submit a sealed bid to purchase the real and personal property for cash at closing. If the Financial Manager does not receive any timely bids under this subsection, the LLC may proceed to sell such real property and sell or otherwise dispose of the LLC’s personal property without regard to this Section. If the LLC receives a timely bid or bids under this subsection, the LLC shall proceed to sell the real and personal property to the bidder or highest bidder upon the following terms and conditions:
(1) The bidder or highest bidder (the “Purchaser”) shall designate the closing date of the purchase in writing. The closing date shall not be more than forty-five (45) days after the Financial Manager notifies the Purchaser that he, she or they submitted the highest bid under this Section. The closing of the purchase shall be conducted at the office of Purchaser’s mortgagee or attorney.

(2) The Financial Manager shall provide to the Purchaser at the LLC’s expense and at least five (5) business days before the closing date a commitment from a title insurance company licensed in the state where the real property is located to issue title insurance in the amount of the purchase price of the real property upon recording of proper documents. The title commitment shall be as of a date no more than fifteen (15) days before it is provided under this subsection and shall show that title to the real estate is in the LLC and subject only to liens that will be paid or assumed by the Purchaser at the closing and to standard title insurance exceptions. The title commitment shall also set forth all easements, ordinances, and other restrictions of record. The Purchaser shall notify the LLC of any valid objection to title in writing by the closing date. The LLC shall have a reasonable time, but not exceeding thirty (30) days, to remove the objections, and the closing shall be extended as necessary for this purpose.

(3) The following items shall be prorated as of the day of closing: general taxes; rents; fuel; and other such items. General taxes shall be prorated at the time of closing based on the net general taxes for the current year, if known, otherwise on the net general taxes for the preceding year. The LLC shall pay special assessments, if any, for work on site actually begun or levied before the date of the Purchaser’s exercise of this option. The Purchaser shall pay all other special assessments.

(4) The LLC shall convey the real property to the Purchaser by warranty deed and the personal property by title transfer and/or bill of sale, free and clear of all liens and encumbrances, excepting: municipal and zoning ordinances; recorded easements for public utilities serving the property; recorded building and use restrictions and covenants; general taxes levied in the year of closing; and any easements or liens that are the consequences of the acts of the Purchaser or the Purchaser’s agents.

(5) The Purchaser shall make payment of the purchase price (less prorations and adjustments) to the LLC by certified or cashier’s check at the closing.

Section 4.9 Rights Of Nonmanaging Members. A member who is not a manager shall take no part in the management of the LLC, except as provided by applicable state law or as otherwise provided by this agreement.
ARTICLE 5 - ADMISSION, REMOVAL, AND TRANSFERS OF INTERESTS

Section 5.1  Admission. A person may be admitted as a member only after agreeing in writing to assume all of the obligations and undertakings of the offering member under this agreement, and paying the LLC a reasonable fee, determined in the absolute discretion of the Board of Managers, to cover the costs of preparing, executing, and recording all pertinent documents.

Section 5.2  Removal. Any member may be removed from the LLC on the unanimous decision of the Board of Managers. Upon the removal of a member, the member shall sell and the LLC shall purchase such member’s membership interest in the LLC. The purchase price and payment terms shall conform with the applicable provisions of Sections 5.6 through 5.8.

Section 5.3  Transfers Of Membership Interests With Consent. A member may transfer his or her LLC interest upon receiving the unanimous consent of the Board of Managers.

Section 5.4  Transfer Of Membership Interests to Permitted Transferees. In absence of consent under Section 5.3 above, a member may transfer his or her LLC interest to a Permitted Transferee who agrees to assume all of the obligations and undertakings of the offering member under this agreement, which shall be in writing and substantially in the form of Appendix C to this agreement. A “Permitted Transferee” is (i) the spouse of a transferor whose transfer was not a lifetime transfer made incident to a divorce or legal separation (provided the transferor is a descendant of the initial members), (ii) a trust for the lifetime benefit of such spouse; (iii) a descendant of the initial members, or (iv) a trust for the lifetime benefit of a person described in part (iii) or such person and his or her spouse.

Section 5.5  Other Transfers Of Membership Interests. Except for a transfer with consent under Section 5.3 or a transfer to a Permitted Transferee under Section 5.4, a member shall not transfer any of his, her, or its interest in the LLC except in accordance with the terms of this Section 5.5 and an attempted transfer of any transferable interest not in accordance with the terms of this Section shall not be valid and shall not be reflected on the LLC’s books.

(a)  Notice. A member who wishes to transfer any interest in the LLC under this Section, or who has reason to believe that an involuntary transfer (defined below) or a transfer by operation of law is reasonably foreseeable (an “offering member”), shall give each other member written notice of the intent to transfer such interest in the LLC (the “offered interest”) or of the knowledge that an involuntary transfer or transfer by operation of law is reasonably foreseeable. This notice must contain a description of the portion of interest in the LLC to be transferred; the consideration (if any) to be paid; the terms of transfer and of the payment of consideration (including, but not limited to, the relative percentages of cash and debt, and the terms of any debt instruments); the name, address (both home and office), and business or occupation of the person to whom the interest in the LLC would be transferred; and any other facts that are or would reasonably be deemed material to the proposed transfer.
(b) First Option to Family Unit. The members of the offering member’s Family Unit shall have an option to purchase any or all of the offering member’s membership interest. This option shall be exercisable within thirty (30) days after receipt of the notice provided in subsection (a). If more than one member of the Family Unit exercises such option, each such member shall buy the offered interest in the same proportion as such members’ membership interests bears to one another at the time of the notice.

(c) Second Option In Other Members. If the members of the offering member’s Family Unit do not elect to purchase all the offering member’s interest as provided in subsection (b) above, all other members shall have an option to purchase any or all of the offering member’s remaining membership interest. This option shall be exercisable within forty-five (45) days after receipt of the notice as provided in subsection (a). If more than one member exercises such option, each such member shall buy the offered interest in the same proportion as such members’ membership interests bears to one another at the time of the notice.

(d) Third Option to LLC. If all of the offering member’s membership interest is not purchased under the preceding subsections of this Section, the LLC shall have an option to purchase any or all of the offering member’s remaining membership interest. This option shall be exercisable within sixty (60) days after receipt of such notice as provided in subsection (a).

(e) Transfer Permitted. If all of the offering member’s membership interest is not purchased under the preceding subsections, the offering member may complete the intended transfer. If this transfer is not completed within seventy-five (75) days of such notice, any attempted transfer shall be deemed pursuant to a new offer and this Section shall again apply.

Section 5.6 Purchase Price. The purchase price that members or the LLC must pay for the offered interest under this Article shall be the same as those of any proposed transfer if the proposed transfer for which notice was given is to be made for any valuable consideration in money or money’s worth of property to someone other than the initial members or a descendant of such members. Otherwise, the purchase price that the members or the LLC must pay for the purchased interest under this Article shall be the fair market value of such interest. The fair market value of a membership interest shall be determined by an appraisal performed by an independent professional appraiser, selected by the Board of Managers, who is regularly engaged in valuing closely-held businesses engaged in similar activities. The appraiser shall take into consideration (i) discounts for lack of marketability and lack of control, (ii) market conditions based on comparable properties, and (iii) the assessed value of the LLC’s real property. The appraiser’s decision in this matter shall be conclusive. If the purchaser is not the LLC and the offering member owes any amounts to the LLC, such amounts shall be offset against the purchase price paid to the offering member and shall instead be paid to the LLC by the purchaser at the closing.

Section 5.7 Payment Terms. The purchase price for the sale of a membership interest may be paid in twenty (20) equal annual principal payments, plus interest accrued through the date of payment, beginning on the date of the closing of such sale. Interest shall be computed at the long-term applicable federal rate for federal income tax purposes. The buyer
shall give the offering member a promissory note as evidence of this debt, and the buyer may prepay all or any part of the principal balance of the note at any time without penalty or premium.

Section 5.8  The Closing. The purchase of interest in the LLC under this Article shall take place at a closing to be held not later than the tenth (10th) day after the earlier of the date on which the members’ purchase options have all expired, or the earliest date on which the members in the aggregate exercise their purchase options, if any, to buy all of the offered interest. The closing shall be held during normal business hours at the LLC’s principal business office, or at any other place to which the parties agree. The LLC shall adjust its books to reflect the transfer of the interest in the LLC.

Section 5.9  Donee’s Put Right To Qualify Gifts For Annual Exclusion. For sixty (60) days immediately following the date of any gratuitous transfer of a membership interest that is authorized under this agreement (“the gift”), the donee of the gift shall have the right (the “put right”) to require that the donor of the interest purchase the interest that the donor has transferred for its fair market value as determined for federal gift tax purposes. This put right shall apply to the lesser of: (i) the total amount of the gifts of interests in the LLC that the donor has given to the donee during the calendar year, and (ii) the federal gift tax annual exclusion amount (currently $14,000). The donee may exercise this put right by a written request delivered to the donor. This put right may be exercised on behalf of the donee, if the donee is unable to exercise the right because of a legal disability (including minority), by a legally authorized guardian or other personal representative. If the donee is under a legal disability and has no then-serving personal representative, the managers shall appoint an appropriate adult individual to act for the donee under this Section.

Section 5.10  Purchase On Death Of A Member.

(a) Upon the death of any member, the deceased member’s legal representative shall provide written notice of a deceased member’s death to the other members and the LLC. The other members of the deceased member’s Family Unit shall have forty-five (45) days from the date of receipt of notice of the death in which to exercise an option to purchase any or all of the deceased member’s membership interest that is transferred to someone other than a Permitted Transferee. Such option shall be exercised by the delivery of written notice of exercise of the option to purchase to the deceased member’s legal representative or agent, the LLC, and all other members. If the option is exercised, the deceased member’s legal representative or agent shall be obligated to sell, and the member shall be obligated to purchase the deceased member’s membership interest subject to the exercised option for the price and upon the terms and conditions set forth in this Section. If more than one member of the Family Unit exercises such option, each such member shall buy the offered interest in the same proportion as such members’ membership interests bears to one another.

(b) If the other members of the deceased member’s Family Unit do not exercise the option to purchase all of a deceased member’s interest as provided in subsection (a) above, the other members of the LLC may elect to purchase any or all of the deceased member’s
remaining membership interest that is not transferred to a Permitted Transferee within sixty (60) days from the date of the notice provided in subsection (a). Such election shall be exercised by the delivery of written notice of exercise of the option to purchase to the deceased member’s legal representative or agent, the LLC, and each of the other members. If the option is exercised, the deceased member’s legal representative or agent shall be obligated to sell, and the purchasing members shall be obligated to purchase the deceased member’s membership interest subject to the exercised option at the price and upon the terms and conditions set forth in this Article. If more than one member exercises an option to purchase under this paragraph, the members exercising their option shall be entitled to purchase the membership interest in the same proportion as their membership interests bear to one another.

(c) If all of a deceased member’s LLC interests are not purchased under subsections (a) and (b) above, the LLC may elect to purchase any or all of the deceased member’s membership interest within seventy-five (75) days from the date of written notice as provided in subsection (a) above.

(d) The purchase price and terms of any interest of a deceased member purchased under the terms of this Section shall be as provided in this Sections 5.6 through 5.8.

ARTICLE 6 - DISSOLUTION

Section 6.1 Causes Of Dissolution. The LLC shall be dissolved upon the written vote of all of the members who hold at least seventy-five percent (75%) of the membership interests, or the happening of any of the following:

(a) An event makes it unlawful for all or substantially all of the business of the LLC to be continued, and the event is not cured within ninety (90) days after notice to the LLC of the event.

(b) A court orders dissolution, pursuant to applicable state law.

Section 6.2 Continuation. The LLC shall not be dissolved, however, and it shall continue under this agreement as then in effect, if, within ninety (90) days after the date of the event that would otherwise cause the dissolution of the LLC under Section 6.1, all of the members who hold at least seventy-five percent (75%) of the membership interests vote to continue the LLC.

Section 6.3 Upon Dissolution. Upon its dissolution, the LLC shall end and commence to wind up its affairs. The members shall continue to share in profits and losses during liquidation as they did before dissolution. The LLC’s assets may be sold, if a price deemed reasonable by the Board of Managers can be obtained. The proceeds from liquidation of LLC assets shall be applied as follows:
(a) First, all of the LLC’s debts and liabilities to persons other than members shall be paid and discharged in the order of priority as provided by law;

(b) Second, all debts and liabilities to members shall be paid and discharged in the order of priority as provided by law;

(c) Third, all remaining assets shall be distributed proportionately among the members based on their respective positive capital accounts.

Section 6.4 Gain Or Loss. Any gain or loss on the disposition of LLC properties in the process of liquidation shall be credited or charged to the members in proportion to their positive capital accounts, except that gain or loss with respect to property contributed to the LLC by a member shall be shared among the members so as to take account of any variation between the basis of the property so contributed and its fair market value at the time of contribution, in accordance with any applicable U.S. Treasury regulations. Any property distributed in kind in the liquidation shall be valued and treated as though it was sold and the cash proceeds distributed. The difference between the value of property distributed in kind and its book value shall be treated as a gain or loss on the sale of property, and shall be credited or charged to the members accordingly.

Section 6.5 LLC Assets Sole Source. The members shall look solely to the LLC’s assets for the payment of any debts or liabilities owed by the LLC to the members and for the return of their capital contributions and liquidation amounts. If the LLC property remaining after the payment or discharge of all of its debts and liabilities to persons other than members is insufficient to return the members’ capital contributions, they shall have no recourse against the LLC or any other members, except to the extent that such other members may have outstanding debts or obligations owing to the LLC.

ARTICLE 7 - MARITAL PROPERTY INTEREST OF A MEMBER’S SPOUSE

Section 7.1 Limitation On Spouse’s Rights As Member. Any marital property interest that a spouse might have in a member’s percentage interest under Wisconsin law is subject to the terms and conditions of this agreement, and the spouse shall have no right to participate in management, including without limitation vote as a member or attend member meetings, and shall have no rights or interest except through the member. Each member agrees to indemnify the LLC from any expenses, damages, losses, claims, liability or adverse affect that may result by reason of a spouse, deceased spouse, or divorced spouse having any rights or interest in the LLC other than through the member and in accordance with this agreement.

Section 7.2 Married Member’s Option To Purchase. If a member’s marriage is terminated by divorce (which shall include legal separation) or by the death of the member’s spouse, and the member does not succeed to his or her spouse’s marital property interest, if any, in the member’s percentage interest, then the member shall have an option to purchase all, but not less than all, of his or her spouse’s interest in the member’s percentage interest. This option shall be exercisable within sixty (60) days after the date of entry of a judgment of divorce or
legal separation or within nine (9) months after the date of the spouse’s death, whichever is applicable. If the member elects to exercise this option to purchase, the member shall give written notice of the election to his or her spouse or the spouse’s legal representative, whichever is applicable.

Section 7.3 Member’s Option To Purchase.

(a) If the member (the “non-electing member”) does not elect to exercise the option to purchase all of the spouse’s interest within the required period, the other members of the non-electing member’s Family Unit shall have an option to purchase any or all of the spouse’s interest in the member’s percentage interest, within fifteen (15) days of expiration of the non-electing member’s option. If two or more other members elect to purchase the spouse’s interest in the member’s percentage interest and they cannot agree on the portion of member’s percentage interest that each shall purchase, then each electing member shall be entitled to purchase the member’s percentage interest in the same proportion that their percentage interests bear to each other at the date of entry of the judgment of divorce or legal separation or the spouse’s death. To exercise the option to purchase, written notice shall be given of the election to the spouse or to the spouse’s legal representative, whichever is applicable.

(b) If the other members of the non-electing member’s Family Unit do not elect to purchase all of the spouse’s interest within the required period, the remaining members shall have an option to purchase any or all of the spouse’s interest in the member’s percentage interest, within fifteen (15) days of expiration of the Family Unit’s option. If two or more other members elect to purchase the spouse’s interest in the member’s interest and they cannot agree on the number of member’s percentage interest that each shall purchase, then each electing member shall be entitled to purchase the member’s percentage interest in the same proportion that their percentage interests bear to each other at the date of entry of the judgment of divorce or legal separation or the spouse’s death. To exercise the option to purchase, written notice shall be given of the election to the spouse or to the spouse’s legal representative, whichever is applicable.

Section 7.4 LLC’s Option To Purchase. If all of the spouse’s interest in the member’s interest is not purchased under Section 7.3, the LLC shall have an option to purchase all, but not less than all, of the spouse’s interest in the member’s interest. This option shall be exercisable within thirty (30) days after expiration of the options above. In the decision of the LLC on whether to exercise the option to purchase the spouse’s interest in the member’s interest, the non-electing member agrees that, if he or she is a member of the Board of Managers, he or she shall vote in accordance with the directions of a majority of the other managers, and the non-electing member agrees to cooperate with the managers in every reasonable way to effectuate the purposes of this agreement. If the LLC elects to exercise the option to purchase, it shall give written notice of the election to the member’s spouse or to the personal representative of the spouse’s estate, whichever is applicable.
Section 7.5  Purchase Price And Terms Of Payment. If an option to purchase under this Article is exercised, the member’s percentage interest subject to the option shall be purchased for the purchase price and upon the payment terms provided in Article 5.

Section 7.6  Extension Of Time Periods. If a member’s spouse dies and a petition for determination of the classification of the member’s percentage interest has been filed with the probate court before the periods for exercise of the options to purchase by the member or the LLC have expired, then the periods shall expire thirty (30) days and forty-five (45) days, respectively, from the date of the final determination of the spouse’s interest in the member’s percentage interest.

ARTICLE 8 - MISCELLANEOUS

Section 8.1  Notices. Any notice under the agreement shall be given and served either by personal delivery to the party to whom it is directed, or by registered or certified mail, postage and charges prepaid, and if it is sent to a member, it shall be addressed with his, her, or its address as it appears on the records of the LLC. Any notice shall be deemed given when it is personally delivered, or, if mailed, on the date it is postmarked by the U.S. Postal Service, if it was addressed as required in this Section. Any member may change his, her, or its address for purposes of the agreement by written notice to the managers, stating his, her, or its new address. A change of address shall be effective fifteen (15) days after the notice is received by a manager/member.

Section 8.2  Personal Property. The interests of each member in the LLC are personal property.

Section 8.3  Amendment. This agreement shall be amended automatically to reflect any valid transfers of membership interests. Otherwise, this agreement shall be amended only by vote of the members as provided in Section 4.2.

Section 8.4  Partition. No member or successor to any member shall have the right, while this agreement is in effect, to have any LLC property partitioned, or to file a complaint or institute any proceeding at law or in equity to have any LLC property partitioned, and each member, on behalf of such member and such member’s successors and assigns, hereby waives any such right.

Section 8.5  No Waiver. The failure of any member to insist upon strict performance of a covenant hereunder or of any obligation hereunder shall not be a waiver of such member’s right to demand strict compliance therewith in the future.

Section 8.6  Number And Gender. Whenever required by the context, the singular number shall include the plural and the plural number shall include the singular, the masculine, feminine, or neuter gender shall include all genders, and the word “person” shall include individuals, corporations, partnerships, trusts, limited liability companies, and other entities.
Section 8.7  **Applicable Law.** This agreement shall be governed by and construed in accordance with the laws of the state of Wisconsin.

Section 8.8  **Severability.** Every provision of the agreement is intended to be severable. If any term or provision hereof is invalid for any reason whatsoever, its invalidity shall not affect the validity of the remainder of the agreement.

Section 8.9  **Good Faith.** The performance of any act, or the failure to perform any act, by a member or the LLC, the effect of which causes any loss or damage to the LLC, shall not subject such member or the LLC to any liability, if the decision to perform or not to perform the act was made pursuant to advice of the LLC’s legal counsel or in good faith to promote the LLC’s best interests.

Section 8.10  **Successors And Assigns.** This agreement shall be binding upon and shall inure to the benefit of the members, their respective heirs, assigns, successors and legal representatives and each member agrees, on behalf of such member and such member’s heirs, assigns, successors and legal representatives, to execute any instruments which may be necessary or appropriate to carry out the purposes of this agreement, and hereby authorizes and directs such heirs, assigns, successors and legal representatives to execute any and all such instruments. Each and every successor to the interest of any member shall hold such interest subject to all of the terms and provisions of this agreement.

**ARTICLE 9 - DEFINITIONS**

Section 9.1  **Agreement.** The term “this agreement” refers to the operating agreement of XYZ, LLC, as amended from time to time and includes all appendices, as they may be amended from time to time.

Section 9.2  **Children And Descendants.** “Children” and “descendants” include those children and lineal descendants of a member who is now living and those later born, subject to the following rules:

(a)  “Children” and “descendants” include an adopted person and that adopted person’s descendants if that adopted person is adopted before reaching eighteen (18) years of age;

(b)  “Children” and “descendants” include those born outside of wedlock, if, during such child’s or descendant’s lifetime, his or her parent through whom such child or descendant claims under this agreement, has acknowledged such person as his or her child in a writing duly signed and notarized during such parent’s lifetime; and

(c)  “Children” and “descendants” include a child produced before the parent’s death by donor artificial insemination, in vitro fertilization or other form of surrogate parenthood, whether or not such child was legally adopted by such parent before such parent’s death.
Section 9.3  **Capital Accounts.** “Capital accounts” or “LLC capital” is the total of the members’ capital contributions, adjusted as provided in this agreement.

Section 9.4  **Income Offset.** “Income offset” shall be synonymous with and interpreted consistently with “qualified income offset” as defined in U.S. Treasury Regulations Section 1.704-1(b)(2)(ii)(d), as amended.

Section 9.5  **LLC Capital.** “LLC capital” is the total of the members’ capital contributions, as adjusted pursuant to the agreement.

Section 9.6  **Members.** “Members” or “member,” when used without the word “manager,” shall refer to both the members who are managers and the nonmanaging members.

Section 9.7  **Membership Interests.** “Membership interests” are the relative percentage interests of the individual members in the LLC, as listed on Appendix A to this agreement.

Section 9.8  **Net Cash Flow.** “Net cash flow” is the LLC’s total net income, computed for federal income tax purposes, increased by any depreciation or depletion deductions taken into account in computing taxable income and any nontaxable income or receipts (other than capital contributions and the proceeds of any LLC borrowing); and reduced by any principal payments on any LLC debts, expenditures to acquire or improve LLC assets, any proceeds from the sale or exchange of LLC assets, and such reasonable reserves and additions thereto as the managers shall determine to be advisable and in the best interests of the LLC, having due regard to the interests of the nonmanaging members.

Section 9.9  **Spouse.** A “spouse” of a member means any individual who is the member’s then lawfully married spouse (“then” referring to the time at which it is necessary to determine a person’s marital status) and who is then living with the member (disregarding temporary absences due to vacation, illness, or other emergency) and who is not then a party to an action for separation, separate maintenance, dissolution of marriage, or similar proceeding. The term “spouse” also shall include a widow or widower of a deceased member if at the member’s death the requirements of this Section were met.

Section 9.10  **Tax-Sensitive Adjustments.** “Tax-sensitive adjustments” are all adjustments to a member’s capital account that are not specifically required under the terms of this agreement, but that are required by U.S. Treasury Regulations Section 1.704-1(b)(2)(iv) (“Maintenance of Capital Accounts”), as amended. Such adjustments shall be made annually, unless these regulations require a more frequent adjustment.

Section 9.11  **Transfer.** “Transfer” of a membership interest includes any sale, pledge, encumbrance, gift, bequest, or other transfer or disposition of the membership interest or permitting it to be sold, encumbered, attached, or otherwise disposed of, or changing its ownership in any manner, whether voluntarily, involuntarily, or by operation of law. “Transfer” shall not include any assignment of any membership interest to another member or to any trust.
that is revocable by the assignor or by the assignor and his or her spouse, but such trust shall be treated as the agent of the assignor, and any subsequent disposition of such membership interest by such trust shall be deemed to have been made by the trust’s settlor or grantor.

(a) An “involuntary transfer” is any transfer made on account of a court order or otherwise by operation of law, including any transfer at death and any transfer incident to any divorce or marital property settlement or any transfer pursuant to applicable community property, quasi-community property, or similar state law.

(b) A “voluntary transfer” is any transfer made during a member’s lifetime that is not an involuntary lifetime transfer.

(c) Unless the context indicates otherwise, “transfer” includes both voluntary and involuntary lifetime transfers.

Section 9.12 Incapacity. A manager shall be deemed “incapacitated” if as a result of illness or mental or physical disability the manager is unable to give prompt and intelligent consideration to financial matters. The determination as to a manager’s incapacity at any time shall be made by a licensed physician who is familiar with the manager’s condition and who is not related by blood or marriage to any member. Any manager may rely upon written notice of a determination made under the provisions of this Section. In the absence of such written notice of a manager’s incapacity or any other manager, may petition the court having jurisdiction over the LLC for a determination that such manager is incapacitated. The expenses of any such examination or court proceeding shall be paid by the LLC.

MEMBERS:

___________________________________  ______________________________
Fred Smith      Mary Smith
APPENDIX A

The following is a list of the members of XYZ, LLC and the percentage interest that each member holds in the LLC:

<table>
<thead>
<tr>
<th>Name of Member</th>
<th>Percentage Interest</th>
</tr>
</thead>
<tbody>
<tr>
<td>Fred Smith</td>
<td>50%</td>
</tr>
<tr>
<td>Mary Smith</td>
<td>50%</td>
</tr>
</tbody>
</table>

The following is a list of the members of XYZ, LLC who serve as Managers of the LLC:

<table>
<thead>
<tr>
<th>Name of Manager</th>
<th>Type of Manager</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mary Smith</td>
<td>Financial Manager</td>
</tr>
<tr>
<td>Fred Smith</td>
<td>Property Maintenance Manager</td>
</tr>
</tbody>
</table>

I certify that this information is accurate as of March 24, 2016.

XYZ, LLC

By: __________________________
Title: Financial Manager
APPENDIX B

I am a member and manager of XYZ, LLC, a Wisconsin limited liability company (the “LLC”). Under Section 4.1 of the LLC’s operating agreement dated March 24, 2016, I have the right to designate a person to succeed me as manager upon my death, incapacity or resignation.

I hereby designate ________________ to succeed me as manager of the LLC upon my death, incapacity or resignation.

Dated _________________, ________.

__________________________
Manager
APPENDIX C

DECLARATION OF GIFT OF MEMBERSHIP INTEREST IN XYZ, LLC

I, (Name of Donor), hereby give to (Name of Donee) (the “Donee”), a ____% membership interest in XYZ, LLC, a Wisconsin limited liability company (the “LLC”), in consideration of love and affection and no money or other property. I certify that the Donee is a Permitted Transferee, as defined in the LLC’s operating agreement, and thus will become a member of the LLC upon delivery and acceptance of this declaration without the need for the prior written consent of the LLC’s managers.

For sixty (60) days immediately following the date of this gift, the Donee shall have the right (the “put right”) to require that I purchase the membership interest that I have transferred to the Donee for its fair market value as determined for federal gift tax purposes. The put right shall apply to the lesser of (i) the total amount of the gifts of interests in the LLC that I have given to the Donee during the calendar year, and (ii) the federal annual gift tax exclusion then in effect for gifts of present interests. The Donee may exercise this put right by a written request delivered to me.

This declaration of gift is signed by me and shall be effective on _____________.

(Name of Donor)

ACCEPTANCE OF GIFT

I am the Donee referred to in the foregoing declaration. I accept the transfer of a ____% membership interest in XYZ, LLC given to me by (Name of Donor), and I acknowledge that I am aware of my “put right” under this document. I hereby assume all of the obligations and undertakings of the Donor under the LLC’s operating agreement.

(Name of Donee)
I. SPECIAL PLANNING CONSIDERATIONS FOR MINOR CHILDREN

A. General Comments. The designation of a guardian for minor children is one of the most important estate planning decisions that needs to be made by clients with young families. Many clients, however, struggle with this decision because of concerns over potential family conflict and other issues. Often times the difficulty in making this decision can keep such clients from putting any estate plan in place. Thoughtful discussion of client concerns and proactive drafting to address such concerns can help provide clients with peace of mind and facilitate the planning process.

B. Drafting Considerations.

1. Visitation. When the families of a couple are not close and the sibling or parents of one spouse are named as guardian, the other spouse may have concerns that his or her family may not have opportunities to visit and build relationships with the couples’ children if both parents are deceased. Accordingly, when clients raise these concerns consider including specific provisions which reflect the couples desire that their children be provided opportunities to form meaningful relationships with both family lines. Depending upon the family circumstances, consider including provisions authorizing the use of funds held on behalf of
the children to pay for travel and related expenses to facilitate visitation.

2. Religious Concerns. It is not uncommon today for spouses to have different religious beliefs and some couples choose to educate their children in both faiths. In these situations, it is often times very important to each spouse that their children continue to be raised in their respective faith in the event of their death. It can be comforting to such clients to include specific provisions directing the guardians to continue the raising of the children in both faiths.

3. Beneficial Provisions for Guardian. Many clients are concerned with placing the burden of raising their children on their prospective guardians. Often times the designated guardians and their family may also be in very different financial circumstances than the children put under their care (especially after taking into consideration the receipt of life insurance proceeds). Some clients may also have strong feelings against their young children being placed in daycare and want to create the financial means for their guardian to leave the workplace to care for their children. Depending upon the circumstances, it may be appropriate for the client to include some form of specific cash gift to the guardian in their estate plan. Specific provisions providing for the acquisition and maintenance of a residence for the guardian may also be important, especially if the guardian has their own family still at home. If the guardian will need to make a major career adjustment for taking on the responsibility of raising the children under his or her care, it may be appropriate to include provisions compensating the guardian for the loss of income that will be incurred.

4. Avoiding Conflicts of Interest. To protect the guardian against potential conflicts of interest the better practice in many cases will be to not designate the guardian as the sole trustee for the funds to be administered for the minor children under the guardian’s care. Consider implementing a checks and balance system by having a co-trustee from the other family line or a professional independent trustee.

5. Concern Regarding Biological Parent Serving as Natural Guardian. On occasion, there are legitimate reasons for a biological parent not to serve as the natural guardian of his or her child. Drug and alcohol dependence, criminal activity, history of physical and/or
emotional abuse and abandonment of the biological child are all important factors of which a court should be aware when considering whether an independent guardian should be named for a child who has lost the primary custodial parent. Unless parental rights have already been terminated, note that a court will heavily lean toward maintaining a relationship between a biological parent and his or her child if it is in the best interests of the child. Supervised visitation with the biological parent may still be ordered even if an independent guardian is appointed by the court.

C. Sample Provisions.

1. Family Visitation Provision.

“It is my desire that my children develop strong and meaningful relationships with both my family and my husband’s family. Accordingly, I hereby direct that both my parents and siblings and my husband’s parents and siblings shall be given ample and frequent opportunities to visit with my children and form personal relationships with them including, without limitation, alternating family holiday visits. The guardian for my children may utilize assets held for their benefit to pay and/or reimburse reasonable travel expenses including, but not limited to, transportation, meal, and lodging expenses relating to visits by my children to family members, visits by family members to my children, and travel by family members with my children. I direct the guardian to make such distributions as the guardian shall consider reasonably in furtherance of this purpose. The persons receiving such distributions shall not be required to account in detail for distributions made to them for the benefit of my children.”

2. Instructions Concerning Religious Upbringing.

“In the event that both my wife and I are deceased, I direct that my children receive religious education in both the __________ religion of which I am a follower and believer and the __________ religion of which my wife is a follower and believer, it being my intention that my children develop an in-depth understanding and appreciation of both such faiths so that when they become
adults they can make an informed decision of their own personal spiritual path.”

3. **Housing and Standard of Living Provisions for Minor Children and Guardian.**

“We intend that the guardian with whom any minor children of ours reside be reimbursed for all expenses incurred as a direct or indirect result of their providing for the health, education, maintenance and support of such minor children. We also intend that our minor children and such guardian with whom they reside be able to maintain a lifestyle at a level approximately equal to that which we have lived. We direct the trustees to make such distributions as they shall consider reasonably in furtherance of these intentions including, without limitation, retaining any principal and vacation residences we may have owned during our lifetimes, purchasing as a trust asset a residence of sufficient size (or lending funds with or without interest to expand the existing residence of the guardian caring for our children) to accommodate our children and the family of their guardian, giving such guardian and the guardian’s family rent-free use of such residence, maintaining such residence and paying the real estate taxes and insurance costs thereon, paying all or a portion of the payments due on any mortgage, real estate taxes and insurance premiums on the guardian’s principal residence (including a replacement residence of sufficient size which is purchased by the guardian), even if such residence is not a trust asset, providing for household help, child care and related services to assist the guardian with caring for and raising our children, and providing funds for family vacations and other activities for our children, their guardian and the immediate family of such guardian. Persons receiving distributions for the benefit of our children shall not be required to account in detail for such distributions and the trustees shall have no responsibility for any such distributions which the trustees in good faith shall consider reasonably related to the needs and expenses of our children. The provisions of this paragraph providing for distributions to the guardian of our children may remain in effect until our youngest child attains age twenty-one.
(21), notwithstanding the fact that the legal responsibility of such guardian will cease when our youngest child becomes an adult, it being our intention that if the trustees in their sole discretion determine that it is appropriate under the circumstances such guardian shall continue to be disbursed funds to provide a family home for our youngest child until he or she attains age twenty-one (21).”


Example 1 - - Suggested Distribution Amount.

“It is our wish that the guardian of our children receive sufficient distributions from this trust so that the guardian’s working outside of the household is not necessary until after our youngest child enters high school. We believe that the sum of ________ ($______) per year adjusted over time for inflation would be an appropriate discretionary distribution to __________ if she is serving as the guardian of any minor child of ours. We give the trustees, however, absolute discretion in determining the appropriate distribution amount, if any, for __________ or any other guardian who may act for our children. The guardian of our minor children shall not be required to account in detail for distributions to him or her for the benefit of our children and such guardian and the trustees shall have no responsibility for any such distributions which the trustees in good faith shall consider reasonably related to the needs and expenses of our children, whether such distributions are made directly for the benefit of our children or are distributed to the guardian to allow the guardian to refrain from working outside the home.”

Example 2 – Distribution Amount Based on Foregone Salary and Benefits.

“In the event we are both deceased or incapacitated, it is our hope that the person who acts as guardian for our minor children (the “Guardian”) will terminate their outside employment and care for our minor children on a stay-at-home basis until our youngest child enters high school. Accordingly, if the Guardian terminates his or her outside employment in order to care for our children we encourage
and hereby authorize the trustees to make periodic
distributions to the Guardian for his or her reasonable
health, maintenance and support needs. We would
anticipate that such distributions would be generally based
on the value of the Guardian’s salary and benefits at the
time the Guardian terminates employment, adjusted on a
periodic basis to reflect inflation, but such distributions
shall be made upon such terms and conditions as the
trustees in their absolute discretion determine.”

5. **Concern Regarding Biological Parent.**

“I have been advised by legal counsel that the probate court
will normally grant guardianship to the surviving natural
parent; however, I have strong personal feelings about this
issue due to _________’s criminal history, drug and
alcohol abuse, and lack of involvement with my children.
Therefore, I hereby request that the probate court review
_______’s criminal record and seriously consider my
intentions as expressed in this Will and in any separate
Letter of Instruction found with the original of this Will,
which is herein incorporated by reference. In the event that
the probate court considers granting guardianship to
__________, I then request that the court order the
Wisconsin Department of Children and Families or other
appropriate agency to conduct a custody evaluation to
determine whether my children’s best interests will be
served by the appointment of _________ as their
guardian.”

II. **ESTATE PLANNING PROVISIONS FOR TROUBLED BENEFICIARIES**

A. **General Comments.** Health conditions, lifestyle choices and other
behavioral issues concerning beneficiaries can require unique customized
drafting in estate planning documents. Identifying such concerns during
the early stages of the client representation is essential in properly
addressing these issues during the drafting process.
B. **Drafting Considerations.**

1. **Health Issues.**

   a. **Substance Abuse.** A client can have a wide range of views regarding substance abuse. Some clients view drug and alcohol abuse as a recurring medical problem, while others view it as a series of irresponsible choices and manipulations. Whether a beneficiary has had some success in recovery, even if followed by relapse, may also impact the approach a client may wish to take in their estate planning documents. Disinheritance, permitted or required drug testing, or lifetime trusts with discretionary distributions only are among the drafting options.

   b. **Mental Illness.** Mental illness may raise a number of the same concerns as does substance abuse, although clients tend to assign less blame to the beneficiary. Mental illness can often be managed with therapy and prescription medication. Furthermore, if mental illness reaches a certain level, the beneficiary may actually be disabled and be eligible for government programs for disabled individuals, such as Medicaid and/or Supplemental Security Income. Although beyond the scope of these presentation materials, the client may consider the use of a special needs trust under those circumstances.

2. **Lifestyle Choices.** Estate plans can provide a way for a client to show disapproval of a beneficiary’s lifestyle choices or beneficiary conduct which the client feels is inappropriate. Drafting estate planning provisions for beneficiaries that may be participating in an extreme religion or are incarcerated can be tricky. In certain circumstances, disinheritance may be appropriate if the client is concerned that any receipt of assets by the beneficiary will be diverted to a religious cult or subject the beneficiary to manipulation or extortion.
C. Sample Provisions.

1. General Provision for Beneficiaries Unable to Administer Own Affairs.

“Distribution to Beneficiaries Unable to Administer Affairs. If a beneficiary is, in the opinion of the Trustee, unable to properly administer his or her affairs, distributions to such beneficiary may, in the Trustee's discretion, be made to such beneficiary or be applied directly by the Trustee for the health, support, maintenance and education of the beneficiary, or his or her dependents, or be distributed to a friend or relative or to his or her legal guardian, if any, to be applied for such purposes. The Trustee may determine that a beneficiary is unable to administer his or her affairs for reasons including, but not limited to, the following: (1) a history of mental illness; (2) a history of drug or alcohol dependency; (3) cognitive limitations of any sort; or (4) a history of bankruptcy or other problems with creditors. The Trustee shall not be responsible for the application of distributions by other persons under this paragraph. The receipt of such other persons shall discharge the Trustee of all liability with respect thereto. If a beneficiary has a disability which the Trustee determines would entitle such beneficiary to receive government benefits such as Supplemental Security Income or Medicaid, or if a beneficiary is receiving any government benefits which would be reduced or eliminated by a distribution from any trust hereunder, the Trustee shall have the discretion to establish a special needs trust for such beneficiary.”

2. Simple Substance Abuse Provision.

“If, in the absolute discretion of the Trustee, ____________ is actively using alcohol, illegal drugs or any other controlled substance (legal or otherwise) in an abusive manner, all distributions, if any, shall be applied directly by the Trustee for the health, support, maintenance and education of ____________. Distributions may specifically be made to provide rehabilitation or other treatment for
s’s drug and/or alcohol dependency. No distributions shall be made directly to _________ while she is actively using alcohol, illegal drugs or any other controlled substance in an abusive manner, as determined by the Trustee. The Trustee shall have the absolute discretion to determine whether _________ is actively using alcohol, illegal drugs or any other controlled substance and the Trustee’s suspicion of same shall be sufficient to withhold distributions to her.”


“If the Trustee suspects that any beneficiary is actively using alcohol, illegal drugs or any other controlled substance (legal or illegal) in an abusive manner, the Trustee may suspend all distributions to him or her hereunder and require that the beneficiary submit to one or more examinations, including, but not limited to, laboratory tests of hair, tissue and/or bodily fluids, to determine the presence of alcohol, illegal drugs or any other controlled substance (legal or illegal) in the beneficiary’s system, the results of which must be disclosed to the Trustee with the beneficiary’s written consent. If the test results indicate current or recent use of alcohol, illegal drugs or any other controlled substance (legal or illegal), the Trustee may make distributions of income and/or principal for the benefit of, but not directly to, the abusing beneficiary for the treatment of his or her addiction. Such treatment may include, but is not limited to, counseling, group therapy or other medical and/or mental health treatment in an in-patient or out-patient rehabilitation facility specializing in the treatment of addiction. As a condition to the resumption of distributions to a formerly abusing beneficiary hereunder, the beneficiary must do all of the following: (a) submit to all tests required by the Trustee; (b) provide written consent to the disclosure of the test results to the Trustee; (c) as determined by the Trustee, successfully complete an addiction treatment program; and (d) produce a test result showing no use of alcohol, illegal drugs or any other controlled substance (legal or illegal). Notwithstanding the foregoing and anything herein to the
contrary, the Trustee may suspend all distributions to any beneficiary in the event the Trustee determines, in the Trustee’s sole discretion, that a beneficiary is unable to administer his or affairs as provided in paragraph 1 hereunder. Furthermore, it is not the Settlor’s intent to make the Trustee responsible or legally liable to anyone for an abusing beneficiary’s behavior, actions or general welfare, and the Trustee has no duty to inquire into whether a beneficiary is using alcohol, illegal drugs or any other controlled substance (legal or illegal) in an abusive manner.”

4. Participation in Extreme Religious Organization or Cult.

“If, in the Trustee’s absolute discretion, the Trustee believes that a beneficiary is participating in or affiliated with an extreme religious organization or cult, including, but not limited to, an organization which commits or supports aggressive or terrorist acts (hereinafter, a “cult”), the Trustee shall suspend all distributions to such beneficiary hereunder until such time as the Trustee is satisfied that such beneficiary is no longer participating in or affiliated with a cult. If the beneficiary reaches the age of fifty (50) and the Trustee still believes the beneficiary is participating in or affiliated with a cult, the trust for the benefit of such beneficiary shall terminate and the remaining trust assets shall be distributed as if such beneficiary had died on such date. In determining whether a beneficiary is participating in a cult, the Trustee may consider whether the beneficiary has an extreme devotion to a particular person, principle or object or an unreasonable compulsion to participate in or be affiliated with the cult. The Trustee may also consult or seek advice from a licensed practitioner who has a specialty in treating individuals participating in cults. The Trustee (and any licensed practitioner retained by the Trustee) shall be indemnified from the trust estate and held harmless from any liability resulting from the Trustee’s decision to suspend distributions or terminate a trust for the benefit of a beneficiary participating in or affiliated with a cult under the preceding provisions of this paragraph.”

PRIEBE- 10
III. ESTATE PLANNING PROVISIONS FOR PET OWNERS

A. Statutory Pet Trusts – Trust for Care of Animal. Wis. Stat. §701.0408 provides as follows:

§701.0408. TRUST FOR CARE OF ANIMAL.

(a) A trust may be created to provide for the care of an animal alive during the settlor's lifetime. The trust terminates upon the death of the animal or, if the trust was created to provide for the care of more than one animal alive during the settlor's lifetime, upon the death of the last surviving animal.

(b) A trust authorized by this section may be enforced by a person appointed in the terms of the trust or, if no person is so appointed, by a person appointed by the court. A person having an interest in the welfare of the animal may request the court to appoint a person to enforce the trust or to remove a person appointed under this subsection.

(c) Property of a trust authorized by this section may be applied only to its intended use, except to the extent the court determines that the value of the trust property exceeds the amount required for the intended use. Property not required for the intended use must be distributed to the settlor, if then living, otherwise to the settlor's successors in interest.

B. Alternatives.

1. As an alternative to a statutory pet trust, a trust for the benefit of an appointed pet caregiver can be created. In this case, the trustee is granted the discretion to make income and/or principal distributions to the caregiver for the purpose of taking care of the pet.

2. Directions regarding the disposition of a pet can also be made in a tangible personal property memorandum which can be incorporated by reference into a Will under Wis. Stat. §853.32(1)
or treated as a nonprobate transfer to a trust under Wis. Stats. §§705.10(1) and 701.419(2).

C. **Drafting Considerations.**

1. **Pets are Tangible Personal Property.** Keep in mind that pets are property, so there must be a disposition of the pet itself in the governing instrument (either outright or to a pet trust).

2. **Selection of Pet’s Caregiver.** The pet owner should consider the willingness of the caregiver being considered to assume the responsibilities associated with caring for the pet, the ability of the caregiver to provide a stable home and the relationship between the caregiver’s family members and the pet. A series of caregivers can also be named. The trustee of a pet trust can also be given the discretion to select a caregiver for the pet if none is named in the governing instrument.

3. **Selection of Trustee and Trustee Compensation.** If a pet trust is used, the trustee can be an individual or a corporate trustee, although it is unlikely a corporate trustee will be willing to serve unless there are substantial assets set aside. Although the trustee and caregiver may be one in the same, this may create a conflict of interest and possibly a general power of appointment depending upon the standard of distribution used in the governing instrument. The settlor should also consider whether trustee compensation would be appropriate under the circumstances.

4. **Standard of Distribution.** Typical purposes for which a settlor may want distributions made include food and dietary supplements, veterinary care, pet health insurance, grooming, toys, equipment, supplies, other recreational activities (such as dog walking services), boarding and/or pet-sitting services and disposition of the pet’s remains.

5. **Level of Funding.** The pet owner will need to determine how much in assets will be required for the pet’s care, and if applicable, caregiver and/or trustee compensation. Other factors to consider include the pet’s life expectancy (for example, parrots can live for
many decades), the pet’s standard of living prior to the pet owner’s death (Leona Helmsley left $12 million in her will to a trust for her dog) and any special health concerns. On the other hand, allocating an extraordinary amount of assets to or for the benefit of a pet may encourage objection by other beneficiaries.

a. Under Wis. Stat. §701.0408(c), the court has the discretion to determine whether the value of the trust property exceeds the amount required for the intended use, and if so, return the excess amount to the settlor, if living, or to distribute it to the settlor’s successors in interest.

b. If objection by other beneficiaries is a concern to the settlor, he or she may consider naming a charitable residual beneficiary, such as the Wisconsin Humane Society, so that any excess funding, as determined by the court, would pass to the charitable residual beneficiary as the settlor’s successor in interest rather than to the objecting beneficiaries.

6. Pet Trust Termination. If a pet trust is used, the settlor should consider when the trust should terminate (such as at the earlier of the death of the pet or when the level of assets falls to a certain level) and, if there are trust assets remaining at termination, who should be named as the remainder beneficiary(ies).

7. Pet Euthanasia. If the pet owner wants to authorize euthanasia, the circumstances under which the trustee or caregiver may euthanize a pet should be clearly identified in the governing instrument.

8. Durable Powers of Attorney. Consider authorizing an attorney-in-fact to take custody of an incapacitated principal’s pet, place the pet with an alternative caregiver and/or expend resources for the care of such pet in a pet owner’s Durable Power of Attorney.

D. **Interesting Fiduciary Income Tax Note.** The Internal Revenue Service has ruled that although honorary pet trusts may, pursuant to state law, be considered valid trusts for purposes of taxation under Internal Revenue Code § 641, distributions made on behalf of pets are not deductible even though trusts are generally permitted to deduct distributions to trust beneficiaries from their income to determine taxable income. This is because animals are not considered “beneficiaries” for this purpose. Rev. Rul. 76-486. *See also* Rachel Hirschfeld, *Ensure Your Pet’s Future: Estate Planning for Owners and Their Animal Companions*, Marq. Univ. Elder’s Advisor 155 (2007).

E. **Sample Provisions.**

1. **Specific Legacy of Pets and Cash:**

   “If any of the Settlors’ cats, PAULINA, JOHNNY, GEORGIA and RINGO, shall survive the Surviving Spouse, then such surviving cats, as well as all of the toys, equipment and supplies associated with such cats, and the sum of Ten Thousand Dollars ($10,000.00) shall be distributed to the Settlors’ friend, YOKO ONO, currently of New York, New York, if she survives the Surviving Spouse. It is the Settlors’ intent that YOKO ONO shall care for the Donors’ cats as the Settlors would have until the end of such cats’ natural lives. If none of the Settlors’ cats survive the Surviving Spouse, then this legacy shall lapse. Further, if YOKO ONO fails to survive the Surviving Spouse, then this legacy shall lapse.”

2. **Specific Legacy of Pets and Cash with Life Expectancy Adjustment:**

   “If the Settlor’s horse, MR. ED, shall survive the Settlor, then MR. ED, as well as all of the toys, equipment and supplies associated with MR. ED, and the sum of Forty Thousand Dollars ($40,000.00) shall be distributed to the Settlor’s brother, WILBUR POST, currently of Los Angeles, California, if he survives the Settlor. Notwithstanding the foregoing, the Forty Thousand Dollar
($40,000.00) specific legacy specified above shall be reduced by the sum of Two Thousand Dollars ($2,000.00) beginning on January 1, 2017 and an additional Two Thousand Dollars ($2,000.00) each subsequent anniversary of such date thereafter. For example, if the Settlor died on January 2, 2020, the amount of the specific legacy would be reduced to Thirty-Two Thousand Dollars ($32,000.00). It is the Settlor’s intent that WILBUR POST shall care for MR. ED as the Settlor would have until the end of his natural life. If MR. ED does not survive the Settlor, then this legacy shall lapse. Further, if WILBUR POST fails to survive the Settlor, then this legacy shall lapse.”

3. **Excerpts from Caregiver Pet Trust:**

“**Designation of Caregiver.** The Settlor hereby designates his cousin, RUDY KIPLING, as the initial Caregiver for her beloved boa constrictor, KAA. In the event of the death, resignation or inability to serve of RUDY KIPLING as Caregiver, the Trustee shall select a successor Caregiver. In the event that the Trustee cannot secure a suitable successor Caregiver, this Pet Trust shall terminate and the remaining assets shall be distributed as provided below.

**Beneficiary of Pet Trust.** The Caregiver shall be the sole beneficiary of the Pet Trust as long as he provides KAA with proper care. For purposes of this trust instrument, “proper care” shall be defined as providing adequate nutrition (i.e., live mice daily), veterinary care (i.e., regular visits to the veterinarian’s office, but not less frequent than annual visits) and an appropriate living environment (i.e., appropriately-sized cage, weekly cleaning of cage, etc.). It is the Settlor’s intent that the Caregiver provide the same standard of care as the Settlor provided to KAA during her lifetime. The Settlor directs that the Trustee visit the Caregiver’s home on a periodic basis to ensure that KAA is receiving proper care. If the Trustee determines that the Caregiver is not providing proper care, the Trustee may remove the then acting Caregiver and replace him or her with a successor Caregiver.
Distribution of Pet Trust Property. During KAA’s lifetime, the Trustee shall reimburse the Caregiver for all reasonable expenses incurred in providing proper care for KAA. Reasonable expenses shall include, but not be limited to, food and dietary supplements, veterinary care, pet health insurance, grooming, toys and other recreational activities, and occasional boarding services.

Compensation of Caregiver. The Trustee shall distribute to KAA’s Caregiver the sum of One Hundred Dollars ($100.00) on the last day of each month for which the Caregiver provides proper care. The Trustee shall not be entitled to compensation hereunder.

Termination of Pet Trust. The Pet Trust shall terminate upon the earlier of (a) the death of KAA; or (b) when the Trustee cannot secure a suitable Caregiver. In the event that the Pet Trust terminates as a result of the death of KAA, the Trustee shall pay all expenses related to the final veterinary care and disposition of KAA’s remains. The remaining assets shall then be distributed to BOAS-R-US, INC., a qualified charitable organization. In the event that the Pet Trust terminates because the Trustee cannot secure a suitable Caregiver, KAA and all other remaining assets of the Pet Trust shall be distributed to BOAS-R-US.

Euthanization. The Trustee may have KAA euthanized, but only after obtaining a written certification from two (2) independent veterinarians confirming that KAA has a terminal medical condition and that failure to euthanize will only cause KAA pain and/or suffering. In the event that KAA is euthanized, the Pet Trust shall terminate and the remaining assets shall be distributed as provided above.”

4. Simple Statutory Pet Trust:

“Separate Trust for Pets. The separate trust for any pets that survive me shall be administered as follows:

PRIEBE- 16
(a) Caregiver. The trustees shall appoint a caregiver ("Caregiver") who shall care for my pets as I would have done until the end of my pets’ natural lives. If the Caregiver ceases to act, the trustees shall appoint a successor Caregiver.

(b) Income and Principal. The sum of One Thousand Dollars ($1,000.00) per pet that is a beneficiary under this separate trust shall be distributed to the Caregiver each month to be used for reasonable living and health care expenses of the pets, as well as to compensate the Caregiver for his or her care of the pets. Reasonable living and health care expenses shall include, but not be limited to, food and dietary supplements, routine veterinary care and prescribed medications, pet health insurance, grooming, toys, equipment, supplies, other recreational activities (such as dog walking services), boarding and/or pet-sitting services and disposition of the pets’ remains. The remaining accumulated net income and principal may be distributed to the Caregiver or applied for the benefit of the pets in such amounts and at such times as the trustees may determine, in their sole discretion, for the pets’ extraordinary health care expenses.

(c) Distribution of Remaining Assets. Upon the death of the last of my pets to die, any then remaining net trust assets shall be distributed as provided in subparagraph _____ (referring to charitable residual beneficiary).

(d) Intention of Settlor. This trust is intended to constitute a trust for the care of an animal pursuant to §701.0408 of the Wisconsin Statutes, as amended from time to time.”

5. Excerpt of Pet Provision Included in Children’s Trust:

“The net income and principal may be distributed to the Settlers’ child, in the Trustee's discretion, for his or her care, comfort, education, welfare, purchase of a home, starting a business or professional venture or any other worthwhile purpose. In addition, the Trustee may, in the Trustee’s discretion, distribute the net income and principal
to provide care for any of the Settlors' pets who are living with the Settlors’ child. In exercising this judgment, however, the Trustee shall determine whether the proposed disbursement will benefit the Settlors’ child by providing companionship, teaching the Settlors’ child responsibility through pet ownership or any other worthwhile purpose.”

6. **Durable Power of Attorney Provision:**

“Care of Principal’s Pets. In the event that I am no longer able to provide proper care for my pet(s), to take custody of my pet(s); place my pet(s) with an alternate caregiver; and to expend my resources to provide for the proper care of my pet(s), including, but not limited to, payment for food and dietary supplements, veterinary care, pet health insurance, grooming, toys, equipment, supplies, recreational activities, boarding and/or pet-sitting services. It is my intent that, if reasonable and practical, my attorney-in-fact take such actions as to allow me to continue to interact with my pet(s) even if incapacitated, as I believe such contact will benefit my health and general well-being.”