

**Date:** November 19, 2012

**To:** Leon and Debra Black

**From:** Elyse G. Kirschner

**Re:** The Debra R. Black 2012 Family Trust Agreement

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This memorandum explains the principal provisions of the Debra R. Black 2012 Family Trust Agreement and the anticipated tax consequences of certain of its provisions.

***I. The Debra R. Black 2012 Family Trust***

***A. Trust Fund***

Debra will be the creator of the trust. It is anticipated that she will transfer assets valued at an amount equal to Debra's remaining gift tax credit to the trustees. The trust will be governed by the provisions described below.

***B. Dispositive Provisions***

***1. Distributions***

The primary trust provides that the trustees must distribute as much of the trust fund to any one or more of (a) Leon and (b) Debra's issue<sup>1</sup> as the independent trustees determine for any reason.

Leon has the power, exercisable at his death, to appoint any portion of the trust fund to any one or more of Debra's issue.

***2. After Death of Survivor***

The initial trust will end upon the death of the survivor of the two of you. When the trust terminates, the remaining assets will be paid to Debra's issue then living,<sup>2</sup> in a separate lifetime trust for each of them (described in I.B.5, below).

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<sup>1</sup> For all purposes of the trust agreement, Debra's issue are Benjamin, Joshua, Alexander, Victoria, and their descendants.

<sup>2</sup> Assets payable under the trust agreement to an individual's issue will be paid in equal shares to such individual's children. If a child does not survive such individual, the predeceased child's share of the assets will be paid in equal shares to his or her children then living.

### **3. Remote Takers**

In the event the survivor of you is not survived by any of Debra's issue, any undisposed of property will be paid to Debra's heirs-at-law.

### **4. Separate Trusts for Issue**

Assets directed to be held in a separate trust for a child or more remote issue of yours will be held in a trust under article IV of the trust agreement. Each child or more remote issue is referred to as the "Primary Beneficiary." The trustees must pay as much of the trust fund of each trust to the Primary Beneficiary as they determine is necessary for the Primary Beneficiary's health, education, support and maintenance. In addition, the trustees must pay as much of the trust fund of each trust to the Primary Beneficiary as the independent trustees determine. When the Primary Beneficiary reaches age 35, he or she will have the power to appoint the trust fund to or for the benefit of any of Debra's issue (other than himself or herself) either during his or her life or at death. These powers may be suspended, terminated or postponed by the independent trustees for good cause, such as serious illness, creditor issues, a pending divorce or the like.

Each trust will end on the Primary Beneficiary's death. Upon termination, any remaining assets will be paid to the Primary Beneficiary's issue then living, or if the Primary Beneficiary has no issue then living, to his or her siblings then living, or if none, to Debra's issue then living, in each case in a separate lifetime trust for each of them upon the same terms as the terminated trust.

### **C. Trustees**

The two of you will be the initial co-trustees. Leon will be an independent trustee, but will not have the power to make distributions to himself.

During Debra's lifetime, Debra will have the power to designate additional and/or successor trustees. Debra also will have the power to remove trustees, provided that if the removed trustee was an independent trustee, such removal will not be effective until a new independent trustee is designated. After Debra's death or disability, Leon will have these powers. After the death or disability of the two of you, the trustees may designate additional and/or successor trustees of any trust other than a trust for which the Primary Beneficiary has the power to remove trustees.

After the death of the two of you, beginning at age 35, each Primary Beneficiary may designate additional and/or successor trustees of his or her trust (including himself or herself), and may remove trustees of such trust, provided that if he or she removes an independent trustee, such removal will not be effective until a new independent trustee is designated.<sup>3</sup>

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<sup>3</sup> These powers may be postponed by the independent trustee for good cause.

**D. Administration and Modification**

The trust agreement gives the trustees broad investment and administrative powers.

In addition, the independent trustees may modify the trust agreement while either of you is competent, but only after giving you 5 days' written notice. No modification will be effective if it would confer a beneficial interest on any person other than one of Debra's issue while any of them is living. The modification powers have been included to give your trustees the flexibility to deal with future circumstances.

**II. Tax Consequences**

**A. Gift Tax**

Any gift Debra makes to the trust will be a taxable gift.

In 2012, each individual will have a federal credit against lifetime taxable gifts (i.e., gifts in excess of the annual exclusion amounts described above and in excess of gifts for educational or medical expenses paid directly to those institutions and other than gifts to a spouse or charity) of \$5 million. Debra has decided to fund the Trust in 2012 with property the value of which is equal the amount of her entire remaining federal gift tax credit.<sup>4</sup>

We anticipate that, as in past years, the two of you will not "split" your gifts for gift tax purposes.

Federal gift tax returns should be filed to report Debra's gift to the trust. For contributions made in 2012, gift tax returns will be due on April 15, 2013.

**B. Generation-Skipping Transfer Tax**

The generation-skipping transfer ("GST") tax generally is imposed, in addition to any gift or estate tax, on transfers to persons two or more generations below the transferor's own generation, at the highest estate and gift tax rate. If a donor gifts property to a trust of which his or her children are beneficiaries, the GST tax normally is deferred until the interest of the children ends. Under current law, each individual has \$5.12 million of GST exemption. This exemption may be allocated to a trust to protect it from future GST taxes. Unless Congress acts to change the law, this amount will be reduced in 2013 to about \$1.43 million.

Debra's GST exemption will be allocated automatically to the trust to shield from the GST tax those assets that may pass from the trust directly to your grandchildren or more remote issue, unless she elects out of the automatic allocation. We recommend that Debra allow portions of her GST exemption to be allocated to her transfer to the trust on her gift tax return.

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<sup>4</sup> We will discuss with Tom Turrin exactly how much gift tax credit Debra has left.

### ***C. Estate Tax***

The trust agreement does not give Debra an interest in or control over the disposition of trust assets after she has contributed them to the trust. As a result, the trust property should not be included in Debra's estate for estate tax purposes.<sup>5</sup> Accordingly, the full value of the assets remaining in the trust at the death of the survivor of you (including all appreciation on the original gift) should pass to the trusts for Debra's issue without federal or New York estate tax.

### ***D. Income Tax***

During Debra's lifetime, the primary trust will be a grantor trust. This means that all of the trust's income, deductions, and credits will be taken into account by Debra when she files her income tax returns. If the trustees use Debra's social security number as the trust's taxpayer identification number, the trust will not be required to file income tax returns. The independent trustees will have the power to modify the trust so that they may reimburse Debra for any income taxes she incurs that are attributable to the income of the trust.

All gifts to the trust should be made from an account in Debra's own name to ensure that the trust is a grantor trust as to only Debra for income tax purposes.

After Debra's death, each trust will be a separate taxpayer for income tax purposes and will be required to file annual federal income tax returns. Each trust will pay income tax on its income except to the extent distributed to beneficiaries. Each beneficiary will pay income tax on distributions received from the trust to the extent of his or her share of the distributed income.<sup>6</sup>

## ***III. Getting Started***

Once the trust agreement has been signed and notarized, you will need to open an account in the name of the Debra R. Black 2012 Family Trust. Because Debra is the settlor of

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<sup>5</sup> In the event that the assets Debra contributes to the trust were to decrease in value, or in the event the IRS were to "claw back" Debra's 2012 gift if the estate tax exempt amount (currently, \$5 million) at the time of Debra's death were less than the gift tax lifetime credit amount at the time of the gift, the independent trustees could decide to grant Debra a limited power of appointment. If granted, the power would result in the trust property being included in Debra's estate for estate tax purposes at her death. However, when calculating Debra's federal estate tax, Debra's executors would not count the 2012 gift as an "adjusted taxable gift," which means that Debra's estate would essentially get back the gift tax credit previously used when she made the 2012 gift, so she would not have "wasted" her gift tax credit. In addition, the trust agreement gives Debra the option of appointing any trust property that is included in her gross estate to Leon or a trust for his benefit. If she does so, such property will be eligible for the federal estate tax marital deduction and would not be subject to estate tax at Debra's death.

<sup>6</sup> After Debra's death it may be possible for the trusts to avoid New York income tax if they have no New York trustees, no property located in New York and no income from New York sources.

the trust and because the trust is a grantor trust for income tax purposes, the trust may use Debra's social security number as its taxpayer identification number.

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As part of its effort to curb tax shelters, the Internal Revenue Service has issued regulations that impose sanctions on attorneys who provide informal written tax advice without prominently disclosing that the advice cannot be relied upon by the taxpayer for the purpose of avoiding penalties. Because this memorandum contains a discussion of taxes but does not warrant the significant additional time or expense that would be involved in the preparation of a formal opinion that complies with the IRS rules, we include the relevant IRS disclosure, below. If you would like us to prepare a formal tax opinion on which you may rely for penalty relief, please let us know, and we can discuss the cost of preparing one.

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***Internal Revenue Service Circular 230 Notice:*** To ensure compliance with requirements imposed by the Internal Revenue Service, we inform you that any U.S. tax advice contained in this communication (including any attachments) is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code or (ii) promoting, marketing or recommending to another party any transaction or matter addressed herein.

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EGK

cc: Eileen Alexanderson  
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