Memorandum

To: [lawyer]

From: Russell A. Willis III

Date: [redacted]

Re: gift tax return for [client] trust u/a dtd. [redacted]

1. [Spouse] is not given a Crummey withdrawal right, and any distributions of income to him are discretionary. Therefore **the gift to him is not a present interest, and there is no annual exclusion as to him.** Also, of course, his interest in the trust is not eligible for a gift tax marital deduction.

But because he is an "applicable family member" for purposes of section 2702, **his interest is valued at zero for gift tax purposes, and the entire value of the transfer is allocated to the two kids,** who have hanging Crummey powers.

2. Under paragraph A.2 of Article XIX, there is a presumption that transfers by [Transferor] to the trust will be treated as split gifts with [Spouse]. **Unless we are overriding this presumption, [Spouse] should be filing a gift tax return as well, with each spouse reporting half the gross amount.** Note that the election to split gifts would apply to all gifts made by either during the calendar year.

3. Assuming we are splitting the gift, **the present interest exclusion would be $26k as to each of the two kids, aggregating $52k** for calendar 2012. The taxable gift would be $1.584 million, or $792k per spouse, each making a gift of $396k to each kid.

4. For generation-skipping transfer tax purposes, **what we have here is an "indirect skip,"** meaning, it is theoretically possible under the terms of the trust document that the entire corpus might be distributed to [Spouse] and/or the children, but none of them has a general power, so [Transferor] -- and [Spouse], to the extent gifts are split -- would be treated as the transferor for anything that was ultimately distributed to grandchildren or more remote descendants.

Thus, the entries made at Part 1 of Schedule A on the draft return should instead be made at Part 3.

5. My understanding, based on the language at paragraph B.6 of Article III, is that [Transferor] intends **to allow the automatic allocation of GST exemption amounts**, on the assumption that for the most part the trust will in fact be distributed to grandchildren and more remote descendants, rather than

consumed by [Spouse] and/or children. **If so, column C, the 2632(c) election, would remain unchecked.**

6. Then, **even though the allocation is "automatic," an entry should be made on line 5 of Part 2 of Schedule D**, showing that -- assuming we are splitting gifts -- $792k of GST exemption has been allocated to the transfer by each spouse, leaving $4.328 million per spouse available for future transfers.

If we are not splitting gifts, the annual exclusion would be only $26k, rather than $52k, and [Transferor] would be allocating $1.61 million of GST exemption to the transfer, leaving $3.51 million available.

7. However, if as a practical matter [Transferor] intends that this trust may in fact be consumed by [Spouse] and/or children, and she has other assets to which she will be wanting to allocate GST tax exemption amounts in the future, she would want to check column C in Part 3 of Schedule A, and attach a statement indicating she is making "election 1," out of automatic allocation as to this particular transfer, or "election 2," as to this and all future transfers to this trust.