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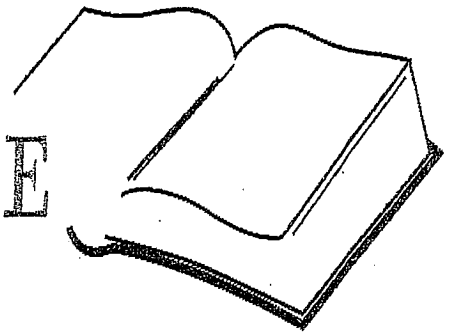

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Second Circuit Boosts Residence Tenancy-in-Common Gifts

By Jeffrey A. Baskies and Howard M. Zaritsky

A personal residence is frequently an important asset in a client's estate, both because the residence may be a valuable asset and because the family may want, sometimes desperately, to keep the residence in the family after the client's death. Often, a gift to a qualified personal residence trust (QPRT) or a sale to an intentionally defective grantor trust (IDGT) is used to transfer a personal residence with favorable estate and gift tax treatment, but very good tax results can be achieved by merely transferring a tenancy-in-common interest in the property, either outright or in conjunction with a QPRT or sale to an IDGT. See Baskies, Savioli, and Zaritsky, *Comparing QPRTs to IDGTs: Depressed Property Values and Low Interest Rates*, in the August 2010 issue of the REPORTER.

The primary problem that arises when one gives away a tenancy-in-common interest in a personal residence is the degree to which the continued use of the property by the donor constitutes a retained beneficial enjoyment under section 2036(a). The recent decision of the Second Circuit in *Estate of Stewart v. Commissioner*, ___ F.3d ___, 106 A.F.T.R. 2d 2010-5183 (2d Cir. Aug. 9, 2010) (2010 Westlaw 3078783), *rev'g and rem'g* T.C. Memo. 2006-225, may be questionable, but it provides a precedent for favorable estate tax treatment of a gift of a tenancy-in-common interest in a personal residence.

Background

The decedent and her son owned as joint tenants with rights of survivorship a house in East Hampton, New York, which they rented out each summer, splitting the rental income and expenses evenly. The decedent also owned a Manhattan brownstone in which she and her son lived on the first two floors and a commercial tenant occupied the top three floors.

Shortly after being diagnosed with pancreatic cancer in December 1999, on advice of her estate planning lawyer, the decedent gave her son a 49 percent tenancy-in-common interest in the Manhattan brownstone. After the gift, the decedent and her son continued to live together in the lower two floors of the Manhattan property. The decedent continued to receive the Manhattan property rents and her son received the rents on the East Hampton property, but after the gift, her son ceased dividing the East Hampton rents with his mother. The decedent continued paying most of the expenses on the Manhattan property.

The decedent died several months after making the gift, and her executor filed an estate tax return listing only her retained 51-percent interest, valued at a 42.5 percent discount (a "partial interest" or "tenants-in-common" discount) from its proportionate share of the fair market value of the underlying property.

The IRS assessed a deficiency, arguing that the decedent had retained possession or enjoyment of the transferred interest in the Manhattan property, that it should be included in her gross estate under section 2036(a), and that, therefore, no partial interest discount was appropriate.

Tax Court Includes Entire Property in Decedent's Gross Estate

The Tax Court (Judge Foley) held for the IRS. There was no debate that the decedent's reserved 51-percent interest in the brownstone was includible in her gross estate, and the case turned on the treatment of the other 49-percent interest.

The court held that the decedent's retention of the property's income stream after the gift was "very clear evidence that the decedent did indeed retain possession or enjoyment." *Quoting Estate of Hendry v. Commissioner*, 62 T.C. 861, 873 (1974). In *Stewart*, the decedent continued to receive the monthly rent payments from the tenant in the upper floors of the brownstone. The son contended that he and his mother had agreed to share the income and expenses proportionately to their interests and that they intended to perform a financial reconciliation to ensure that income and expenses were properly allocated to each owner in both the brownstone and the East Hampton property, but the court found this testimony not to be credible.

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Second Circuit Insists on Partial Exclusion

The Second Circuit (Judge Calabresi) vacated and remanded the case for further action, finding clear error in the determination that the decedent had retained the beneficial enjoyment of the residential portion of the Manhattan brownstone property. The court noted that the decedent clearly retained no legally enforceable right to receive the income. *Citing United States v. Byrum*, 408 U.S. 125 (1972). Therefore, the question was whether she had retained the actual possession or enjoyment of her son's 49-percent interest.

The decedent's formal retention of a 51-percent interest in the property did not, the court stressed, necessarily mean that she retained enjoyment of the transferred 49-percent interest. See, *e.g., Estate of Wineman v. Comm'r*, T.C. Memo 2000-193. The joint use of the residential part of the brownstone by the decedent and her son did not suggest that she had either held exclusive use of that portion or excluded her son's use. See *Estate of Spruill v. Comm'r*, 88 T.C. 1197, 1225 (1987); *accord Guynn v. United States*, 437 F.2d 1148, 1150 (4th Cir. 1971).

The Second Circuit concluded that the Tax Court should look to *Rev. Rul. 79-109*, 1979-1 C.B. 297, to determine the precise portion of the son's interest in which the decedent retained a right to income, if any. The Second Circuit noted that *Rev. Rul. 79-109* provided a useful way to do so, looking at the relative receipt of income (including imputed income from use) and burdens of expenses borne by each party. See also *In re Estate of Uhl*, 241 F.2d 867 (7th Cir. 1957).

In *Rev. Rul. 79-109*, a decedent conveyed to his adult children a vacation home, but retained the lifetime right to use it or to keep the rents for January of each year. The IRS concluded that the "the amount includible in the gross estate [under section 2036(a)] is that portion of the transferred property that would be necessary to yield the retained income." The rental value of the property for January was 13.3 percent of the rent produced annually, so 13.3 percent of the value of the property should be included in the decedent's gross estate.

To apply the logic of *Rev. Rul. 79-109* to *Stewart*, the Tax Court would have to consider both rental income received by the decedent and expenses incurred by her, in determining the net amount she had retained. The Second Circuit also stated that the Tax Court was the proper party to determine whether there was an agreement to offset some of the rent or expenses on the Manhattan property with those of the East Hampton property.

A Strong Dissent

One judge (Judge Livingston) strongly dissented, claiming that the majority created a loophole that allows individuals to avoid the estate tax by using lifetime gifts of testamentary effect while retaining the benefits of the property for life.

The dissent stressed that, in *Stewart*, the decedent had changed nothing by making this gift; she had retained all of the rents from the Manhattan property and continued to live there with her son after the transfer in the same manner as she had before the transfer. In the words of the dissent:

> [T]he majority, misreading a body of case law that primarily involves transfers of 100% of a family member's interest in a property to another family member, concludes that post-transfer co-occupancy is near-conclusive evidence that the transferor can no longer enjoy the substantial economic benefits of residence to the extent of the transferred interest. Indeed, the majority finds such co-occupancy

> dispositive even here, where the transfer concerned only a fraction of the transferor's interest, created a tenancy in common that guaranteed the transferor continued access to the entirety of her property, and involved a transferor and transferee who the majority agrees were found *correctly* by a court of law to have reached an agreement undercutting the economic substance of the very transfer under consideration. This turns the proper — and longstanding — construction of section 2036 on its head. It also opens up a loophole that will vitiate to a considerable degree the efficacy of this section, in conjunction with the uniform rate schedule now applicable to estate and gift taxes, in ensuring that the estate and gift taxes are equitably imposed on all those subject to them.

The dissent contended that the majority misread the case law and that the cases cited hold only that, when one spouse gives his or her interest in a residence to the other spouse, the continued co-occupancy is not a sign of a retained life estate, but just the sign of a harmonious family. *Estate of Gutchess v. Comm'r*, 46 T.C. 554, 557 (1966); *Union Planters Nat'l Bank v. United States*, 361 F.2d 662, 666 (6th Cir. 1966); *Estate of Roemer v. Comm'r*, T.C. Memo. 1983-509. The dissent stated, however, that outside of a marriage, creating a co-occupancy does not automatically negate a retained life interest under section 2036(a), but merely fails to establish one.

Furthermore, the dissent argued that under section 2036 the critical focus of the majority was wrongfully placed on what the donee received, but should have focused instead on what the decedent retained. The dissent argued that the retained right to use the property, subject to her son's right to do the same, tends to demonstrate, rather than negate, the retention of a life estate. The dissent added, however, that a tenancy-in-common with co-occupancy could effectively remove part of the property from a decedent's gross estate, if it were inconsistent with the transferor's full possession or enjoyment of the property, because it interfered with the transferor's later desire to dispose of the property or because the co-tenant's harmonious co-use was incompatible. But the trier of fact would have to consider if the facts and circumstances surrounding the transfer evidence an agreement (express or implied) that the transferring co-tenant's possession or enjoyment of the property for life was not to be diminished for life or if the evidence negated any such agreement.

The dissent discussed at length the Tax Court's holding in *Estate of Wineman v. Comm'r*, T.C. Memo. 2000-193, which held section 2036(a) inapplicable to a gift of a fractional interest in real estate. The dissent noted that the Tax Court in *Wineman* looked at all of the facts and circumstances surrounding the transfer and subsequent use of the property to determine whether beneficial enjoyment had been retained. The dissent also stated that the decedent's receipt of the rental income from the commercial portion of the brownstone demonstrated her retained beneficial enjoyment over the entire property.

Planning After Stewart

The dissent is likely the better analysis in this case because the focus must be on the effects of the transaction on the donor, not the effects on the donee. Nonetheless, the majority opinion provides a good analysis of the relative significance (or insignificance) of the co-occupancy of the donor and donee in a property following a gift of a tenancy-in-common interest. The majority opinion is clear that such co-occupancy should not in and of itself dispositively show a retained beneficial enjoyment; however, the

dissent is also clear that such co-occupancy should not automatically prove a lack of beneficial enjoyment either.

The taxpayer might have fared better had there been a written co-ownership agreement under which the net rents were to be divided proportionately, perhaps with an offset for the rents on the East Hampton property. Such an agreement would have helped prove the agreement that the son alleged existed as to the use of the East Hampton property. It might also have overcome the reluctance of the Tax Court to believe that the rental income from the Manhattan brownstone was not entirely retained by the decedent.

Careful planners should advise clients of the benefits that a co-ownership agreement provides. A co-ownership agreement can help establish that the situation of the donor has actually changed because of the gift. For example, the co-ownership agreement can establish the right of each co-tenant to use the property and to entertain guests, including overnight guests, without the consent and even over the objection of the other co-owner. It can also give each co-owner the right to keep pets, though perhaps with a coincident responsibility for any damage that pets may cause. Such provisions suggest a very significant change in the position of the donor as to his or her property.

A co-ownership agreement can also negate the ability of either co-tenant to sue for partition. The IRS often cites the ability of a co-tenant to sue for partition as a significant limitation on the discount for lack of marketability of a tenancy-in-common interest. Such a limitation in an agreement, however, cannot likely be used to increase the valuation discount because it is more severe than the terms imposed under state law. See I.R.C. § 2703.

A co-ownership agreement should also apportion the obligations of the parties for expenses and capital expenditures and the right of each co-tenant to share in any rental income. It should also provide that one party's payment of a disproportionally large share of an expense or a capital expenditure creates a binding obligation on the part of the other tenant to repay the excess, and permit each party to be reimbursed also from any rental income that would otherwise inure to the other co-tenant.

A co-ownership agreement can also include buy-sell restrictions that limit the ability of a co-tenant to sell, give away, or otherwise transfer his or her interest in the property. Such restrictions are logical because each co-tenant's use of the property is subject to the other co-tenant's right to use the property, rendering the choice of co-owners a very personal decision. One might be quite willing to co-own a property with one's child, but not necessarily be willing to co-own it with the child's creditors or former spouse. For more on buy-sell agreements generally, see also Aghdami, Mancini, & Zaritsky, *Structuring Buy-Sell Agreements: Analysis With Forms* (Thomson-Reuters/WG&L, 2d ed.).

A written co-ownership agreement with terms such as these will help establish that the donor's position has been materially altered by the gift and that the donor has not retained control or beneficial enjoyment over the portion of the property given away. It will also limit significantly the likelihood that the co-ownership will result in extensive litigation because of disagreements over the maintenance and operation of the jointly-owned property. On co-tenancy agreements, see also Goffe, *Keeping Vacation Property in the Family*, 41st U. Miami Heckerling Inst. on Est. Pl. ¶1811 (2007); Henderson, *Estate and Income Tax Planning for the Passage of Family Homes Using QPRTs, Split Interest Purchases,*

Family LLCs, Dynasty Trusts, Conservation Easements and Other Strategies, SR038 ALI-ABA 641 (Feb. 18-20, 2010); and Way, *Informal Homeownership in the United States and the Law*, 29 ST. LOUIS U. PUB. L. REV. 113 (2009).

Successfully utilizing gifts of tenants-in-common interests, particularly when coupled with a co-ownership agreement, can be an important aspect of wealth transfer planning for clients because the valuation discounts created by tenancy-in-common interests can be quite significant. For example, the decedent's estate in *Stewart* claimed a 42.5-percent discount, which the IRS did not attempt to counter, other than by including the entire property in the gross estate, which would negate the availability of any discount whatsoever. Other cases have allowed more modest discounts, but not insignificant ones. See, *e.g.*, *Propstra v. U.S.*, 680 F.2d 1248 (9th Cir. 1982) (15-percent discount for lack of marketability of community property interest in land); *Lefrak v. Comm'r*, T.C. Memo. 1993-526 (30-percent discount for lack of marketability and control in partial interests in certain apartment buildings); *Estate of Cervin v. Comm'r*, T.C. Memo. 1994-550 (20-percent discount for undivided fractional interest in farm); *Estate of Stevens v. Comm'r*, T.C. Memo. 2000-53 (25-percent discount for undivided fractional interest in improved real estate); *Williams v. Comm'r*, T.C. Memo. 1998-59 (44-percent discount for undivided one-half interest in real estate); *Estate of Forbes v. Comm'r*, T.C. Memo. 2001-72 (30-percent discount); *Ludwick v. Comm'r*, T.C. Memo. 2010-104 (17-percent discount for interest in personal residence transferred to a QPRT).

Moreover, case law regarding the application of section 2036 to family limited partnerships and/or limited liability companies clearly indicates that personal use assets such as residences are inappropriate assets for entities. Cases in which residences are put into such entities often lead to conclusions of implied agreements and full inclusion of the assets in the entities without any discounts. Therefore, alternative discount planning — as demonstrated with the tenancy-in-common discount planning in *Stewart* — is perhaps even more vital when personal residences are involved. Perhaps more clients will benefit from well-crafted tenant-in-common gifts coupled with well-drafted co-occupancy agreements.

Stewart supports the value of using tenancy-in-common gifts to reduce estate taxes. The gift resulted in discounts for both the portion of the asset given away without a retained beneficial enjoyment and the portion of the asset retained. While *Stewart* was mired in litigation, perhaps it would have been easier to resolve had there been an effective co-tenancy agreement executed. The use of such gifts with such agreements is an excellent alternative to the far more complicated family limited partnership or family LLC as a means of dividing real and/or tangible assets between a donor and a donee, and generating appropriate valuation discounts. It is also a good way to increase the tax benefits of a gift to a QPRT or a sale to an IDGT.

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Sample Co-Tenancy Agreement for Parties Owning Property as Tenants in Common – Denies Right to Partition – Designed to Clarify Lack of Retained Interest under Section 2036(a)

CO-TENANCY AGREEMENT

On [date], we, *Donor*, of [address], *Tenant*, of [address], enter into this agreement (the "agreement") relating to our co-ownership of a certain parcel of real estate described in Schedule A (the "property").

RECITALS

A. We own the property as tenants-in-common, in the shares reflected in the deed to the property; and

B. *Tenant* acquired an interest in the property by a gratuitous transfer from *Grantor,* who retains an interest in the property; and

C. We wish to establish rules governing our shared ownership of and benefits in the property, to minimize disputes, and provide an orderly and efficient operation of the property for our mutual benefit.

NOW, THEREFORE, we agree as follows:

AGREEMENTS

Section 1. Co-Ownership Unaffected

This agreement shall not convert our interests in the property into anything other than tenancy-in-common interests in the property.

Section 2. Use

Each of us has the unlimited right to use the property whenever desired, without the consent of the other. Each of us may, without the consent of the other, entertain guests, including allowing guests to stay overnight or for several days without rent or charge, and each of us may, without the consent of the other, keep one (1) domestic animal weighing not more than twenty-five (25) pounds. Each of us shall be liable for one hundred percent (100%) of the costs directly associated with allowing guests to visit or stay and to keeping a pet, notwithstanding the general liability for only a *pro rata* share of expenses associated with maintaining the property.

Section 3. Expenses

3.1 Obligation. We shall each be responsible for paying a *pro rata* share (defined below) of the expenses of ownership and operation of the property, except as provided in Section 2 with respect to expenses of entertaining guests and keeping pets. These expenses for which we shall be proportionately liable shall include:

(a) exterior maintenance (including, but not limited to, painting, roof repair, and lawn and garden maintenance); (b) maintenance of the plumbing, electrical equipment (including fixtures and appliances), and heating and cooling equipment; (c) liability, theft, fire, and casualty insurance on the property; (d) property taxes, including all special assessments; (e) interior maintenance (including painting, papering, carpet cleaning and repair); (f) pest control services; and (g) weekly cleaning of the interior of the property by a professional cleaning service.

3.2 Contribution. Any co-tenant who receives a bill for any expense that is to be borne by both of us together shall promptly contact the other and request contribution. The other co-tenant shall remit to the requesting co-tenant payment in full within fifteen (15) days of the date of the request. The requesting co-tenant may pay the share of a co-tenant who fails to make such contribution in full within the said fifteen (15) days and be reimbursed for such payment by the co-tenant who failed to supply such contribution. A co-tenant who makes such a payment for another co-tenant shall have a lien against the share of such other co-tenant for such payment, and may record such lien as may be permitted under applicable state law.

Section 4. Capital Expenditures

We must both agree to any capital expenditure and no co-tenant shall make any capital expenditures to which we do not all agree, unless the expenditure is required to prevent or repair significant damage to the property. We are each responsible for paying a *pro rata* share of the cost of any capital expenditures.

Section 5. Rental Income

We shall each be entitled to a *pro rata* share (defined below) of the rental income generated by the property. Any co-tenant who receives a rent payment that is to be shared by us shall promptly remit the appropriate share to the other co-tenant within fifteen (15) days of the date of the receipt. A co-tenant who is owed a share of rent that has not been remitted within such fifteen (15)-day period may offset such amount against any share of expenses that he or she is otherwise thereafter obligated to pay.

Section 6. Encumbrances

No co-tenant may encumber (defined below) the property without our mutual consent.

Section 7. Partition

We each now waive any right granted under applicable state or local law to require that the property be partitioned.

Section 8. Right of First Refusal

No co-tenant may transfer (defined below) any interest in the property, except as provided in and after complying with the terms of this section. Any attempted transfer of an interest in the property that does not comply with this section shall be void and shall not be respected for any purpose.

8.1 Sale with Full Consent. A co-tenant may sell all or any portion of such co-tenant's interest in the property with the advance written consent of the other co-tenant. The other co-tenant may withhold such consent with or without reasonable cause.

8.2 Receipt of a *Bona Fide* Offer. A co-tenant who receives and wishes to accept a *bona fide* offer (defined below) to effect a voluntary transfer (defined below) of such co-tenant's interest in the property must promptly send a notice to the other co-tenant and offer, or be deemed automatically to have offered, to sell all of such offering co-tenant's interest in the property to the other co-tenant at the same price and on the same terms as are contained in such *bona fide* offer. The other co-tenant shall have thirty (30) days from the receipt of such notice in which to agree to buy all, but not less than all, of the offering co-tenant's interest in the property. If the co-tenant to whom notice must be sent does not agree to buy all of the offering co-tenant's interest in the property, such proposed voluntary transfer may be completed upon the terms of the *bona fide* offer to which the notice relates.

8.3 Involuntary Transfer. A co-tenant who possesses information that would lead a reasonable person to believe that an involuntary transfer (defined below) of such co-tenant's interest in the property may occur within the next ninety (90) days shall promptly send a notice to the other co-tenant and offer, or be deemed automatically to have offered, to sell such offering co-tenant's interest in the property to such other co-tenant for the most recent fair market value of the property, as assessed for real property tax purposes by the municipality in which the property is situated. The other co-tenant shall have thirty (30) days from the receipt of such notice in which to agree to buy all, but not less than all, of the offering co-tenant's interest in the property. If the co-tenant to whom notice is required to be sent does not agree to buy all of the offering co-tenant's interest in the property, such proposed voluntary transfer may be completed.

8.4 Death of a Co-tenant. On the death of a co-tenant, the deceased co-tenant's personal representative (defined below) shall immediately be deemed to have offered to sell to the surviving co-tenant the deceased co-tenant's interest in the property, for the most recent fair market value of the property, as assessed for real property tax purposes by the municipality in which the property is situated. The surviving co-tenant shall have ninety (90) days from the death of the deceased co-tenant in which to agree to buy all, but not less than all, of the deceased co-tenant's interest in the property. If the surviving co-tenant does not agree to buy all of the deceased's co-tenant's interest in the property, the personal representative of the deceased co-tenant may distribute the deceased co-tenant's interest in the property to the person or persons entitled to receive it on account of the deceased co-tenant's death. Such distributees shall, however, be required to sign an amendment to this agreement by which they agree to be bound by its terms as if they were original signatories.

8.5 Terms of Purchase. A co-tenant who buys the interest of another co-tenant under this Section 8 shall pay twenty percent (20%) of the purchase price as a downpayment at the closing (see below), and shall pay the balance of the purchase price in forty (40) equal quarter-annual payments of principal and interest. The first payment shall be made three (3) months after the closing, and all subsequent payments shall include interest added to each installment after the first installment. The buyer shall prepare and give the seller a negotiable unsecured promissory note as evidence of this debt. Such note shall permit the buyer to prepay all or any part

of the principal balance of the note at any time without penalty or premium. Such note shall bear interest at the applicable federal rate established under Section 1274(d) of the Code (defined below) on the date of the closing, compounded semi-annually.

8.6 Closing. A co-tenant's purchase of another co-tenant's interest in the property under this Section 7 shall take place at a closing held at 1:00 P.M. on the one hundred twentieth (120th) day after the date on which the offer to sell is made (or deemed made), at any place to which the parties agree. At the closing, the buyer shall pay for the purchased interest in the property, and the seller shall deliver a deed representing marketable title to the seller's interest in the property, free and clear of all encumbrances, and with evidence of payment of all necessary transfer taxes and fees.

Section 9. Definitions and Miscellaneous

9.1 Copies. More than one (1) copy of this agreement may be executed and we agree and acknowledge that each executed copy shall be a duplicate original.

9.2 Definitions. For purposes of this agreement, the following terms shall have the following meanings:

9.2.1 A "*bona fide* offer" is an offer to buy a co-tenant's interest in the property, from a prospective buyer who is willing and able to complete such purchase.

9.2.2 "Code" shall mean the U.S. Internal Revenue Code of 1986, as amended to each date on which the reference to "Code" shall become relevant.

9.2.3 "Days" shall mean all calendar days, whether or not such days are legal holidays under the laws of the United States or any State.

9.2.4 "Encumber" shall mean any pledging, mortgaging, or otherwise securing any type of debt or obligation with the property, whether incurred voluntarily or involuntarily, and in any manner whatsoever.

9.2.5 "Including" shall have the same meaning as "included, but not limited to," unless otherwise expressly so stated.

9.2.6 A co-tenant's "personal representative" includes any administrator, executor, trustee, or other personal representative who is vested with the responsibility for administering the disposition of any interest in the property on account of a deceased co-tenant's death, and equally any individual who holds such interest in the property as a legatee, distributee, or successor in interest, or trustee when no executor, administrator, or similar fiduciary is appointed or when any appointed executor, administrator, or fiduciary does not have control over any of the deceased co-tenant's interest in the property.

9.2.7 A "transfer" is any sale, pledge, encumbrance, gift, bequest, or other transfer of any interest in the property, whether or not for value and whether or not made to another co-tenant to this agreement. A transfer shall not, however, include any transfer of an interest in the property to a trust that is wholly revocable by the transferor, but the trustee of such trust shall be subject to this agreement as if such trustee were an original signatory.

A. An "Involuntary transfer" is any transfer made on account of a court order or otherwise by operation of law, including 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 co-tenant's lifetime which is not an involuntary transfer. Unless the context indicates otherwise, "transfer" includes both voluntary and involuntary transfers.

9.3 Enforceability. No part of this agreement will be affected if any other part of it is held invalid or unenforceable.

9.4 Entire Agreement. This instrument constitutes the parties' entire agreement with respect to this transaction, and supersedes any prior oral or written understandings or agreements. The Agreement may be amended only in writing.

9.5 Governing Law. This agreement will be governed by and construed according to the laws of the State of [state].

9.6 Nonassignment. Neither party may assign or otherwise transfer or encumber any interest in this agreement.

9.7 Notices. All notices required or permitted to be given under this agreement must be given in writing, and will be deemed given when personally delivered or when received after mailing by registered or certified United States mail, postage prepaid, with return receipt requested. Notice is valid if sent to the following addresses:

Donor, [address]
Tenant, [address]

9.8 Number. Whenever the context of this agreement requires, singular number includes the plural and vice versa. Agreed to by each of the undersigned on the date first noted above.

9.9 Specific Performance. We agree that the property is unique and that failure to perform the obligations under this agreement will result in irreparable damage to the other parties and that specific performance of these obligations may be obtained by a suit in equity.

9.10 Successors. This agreement is binding on and enforceable by and against all of us, our successors, legal representatives, and assigns. No transfer of an interest in the property to any other person or entity may be validly completed unless the transferee agrees in writing to be bound by the terms and conditions of this agreement.

9.11 Waiver. Failure to insist on compliance or enforcement of any provision of this agreement shall not affect its validity or enforceability or constitute a waiver of future enforcement of that provision or of any other provision of this agreement.

DECLARED AND AGREED on the date indicated above.

[Signatures, notary clauses, and schedule omitted from this exemplar]