

# BRINGING THE DEAD BACK TO LIFE: PREPARING THE ESTATE FOR A POST-MORTEM ACTING ROLE

by Ben Laney\*

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## I. INTRODUCTION

The impossible is coming true: the dead are coming back to life.<sup>1</sup> Through the means of computer science and movie magic, studios are making inroads into casting dead actors for appearances in new movies.<sup>2</sup>

In November 2019, Magic City Films announced that James Dean would be digitally resurrected with CGI for *Finding Jack*, an upcoming Vietnam era action-drama.<sup>3</sup> James Dean is well known for the three roles he completed before his early death in 1955: *Rebel Without a Cause*, *East of Eden*, and *Giant*.<sup>4</sup> Magic City Films announced that it had obtained Dean's persona rights and plan to use old footage and photos to digitally recreate the actor.<sup>5</sup> The producer of the film stated that the studio "searched high and low for the perfect character to portray the role of Rogan, which has some extreme complex character arcs, and after months of research, we decided on James Dean."<sup>6</sup> The producer also stated that Dean's family had given support for the project and were viewing this as Dean's fourth movie that he never got to make.<sup>7</sup>

Since the CGI revolution of the late 1990s, there has been a prevailing fear in Hollywood that actors would one day be replaced with digital clones of themselves.<sup>8</sup> These clones would exist only in a computer, would not have to be paid, and would act at the whim of the animator.<sup>9</sup> The idea is that with the ever-advancing technology of computer generated imagery (CGI), these digital recreations of actors would become so life-like that they could substitute for real actors.<sup>10</sup>

Along this line of thought was the concept that one day studios would be able to accurately recreate deceased actors to cast their digital doubles in brand new roles, long after their deaths.<sup>11</sup> There were various attempts throughout the late 1990s and 2000s, but most efforts from that era are seen

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1. Author's original writing.

2. *Id.*

3. Alex Ritman, *James Dean Reborn in CGI for Vietnam War Action-Drama (Exclusive)*, HOLLYWOOD REP. (Nov. 6, 2019), <https://www.hollywoodreporter.com/news/afm-james-dean-reborn-cgi-vietnam-war-action-drama-1252703> [perma.cc/CHQ7-GT23].

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. Rick Lyman, *Movie Stars Fear Inroads By Upstart Digital Actors*, N.Y. TIMES (July 8, 2001), <https://www.nytimes.com/2001/07/08/us/movie-stars-fear-inroads-by-upstart-digital-actors.html> [perma.cc/E758-MQKN].

9. *Id.*

10. *Id.*; Rachel Pick, *CGI Skin Just Got a Whole Lot More Realistic*, VICE (Aug. 13, 2015), [https://www.vice.com/en\\_us/article/ae3mxa/cgi-skin-just-got-a-whole-lot-more-realistic](https://www.vice.com/en_us/article/ae3mxa/cgi-skin-just-got-a-whole-lot-more-realistic) [perma.cc/WDZ5-BXF6].

11. Lyman, *supra* note 8.

today as unbelievable, unconvincing, and creepy.<sup>12</sup> However, with the release of 2016's *Rogue One: A Star Wars Story*, Industrial Light and Magic were arguably the first to successfully bring an actor back from the dead for a brand new role.<sup>13</sup>

Peter Cushing died in 1994, but a digital version of his persona appeared in *Rogue One* as Grand Moff Tarkin, a reprised role from the original *Star Wars*.<sup>14</sup> Unlike other films featuring deceased actors, this was a completely new appearance.<sup>15</sup> This is in contrast to a movie like *Furious 7* — in which Paul Walker died halfway through production, forcing the crew to make changes to accommodate this new limitation and finish the film.<sup>16</sup> And as opposed to a few commercials which used the personas of Audrey Hepburn and Bruce Lee to sell chocolate and alcohol, this was a full acting role.<sup>17</sup>

The *Finding Jack* announcement was met with severe backlash across Twitter, with many users criticizing the morals of casting an anti-war actor in a Vietnam war movie effectively without his consent.<sup>18</sup> Other actors such as Chris Evans and Elijah Wood protested this decision, saying “the complete lack of understanding here is shameful.”<sup>19</sup> The late Robin Williams’ daughter Zelda weighed in on the situation as well, calling the stunt “puppeteering the dead for their ‘clout’ alone.”<sup>20</sup> Zelda Williams’ opinion on the matter is significant, as her father Robin Williams had specifically outlined in his will that his persona is forbidden from being reused for 25 years after his death in order to avoid a similar scenario.<sup>21</sup> The movie is set to release in November 2020, but it remains to be seen whether the backlash

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12. Peter Plantec, *Crossing the Great Uncanny Valley*, ANIMATION WORLD NETWORK (Dec. 19, 2007), <https://www.awn.com/vfxworld/crossing-great-uncanny-valley> [perma.cc/5DFY-JX2F].

13. ROGUE ONE: A STAR WARS STORY (Lucasfilm Ltd. 2017).

14. Kristopher Tapley and Peter Debruge, ‘*Rogue One*’: What Peter Cushing’s Digital Resurrection Means for the Industry, VARIETY (Dec. 16, 2016), <https://variety.com/2016/film/news/rogue-one-peter-cushing-digital-resurrection-cgi-1201943759/> [perma.cc/UNL8-GN3J].

15. Rebecca Hawkes, *From Rogue One’s Peter Cushing to Audrey Hepburn: 6 Stars who were digitally brought back to life*, THE TELEGRAPH (Dec. 20, 2016), <https://www.telegraph.co.uk/films/0/rogue-ones-peter-cushing-audrey-hepburn-stars-digitally-brought/> [https://perma.cc/UJ9U-73DN].

16. Julia Alexander, *Furious 7 used 350 CGI shots of Paul Walker*, POLYGON (Oct. 20, 2015), <https://www.polygon.com/2015/10/20/9577863/furious-7-used-350-cgi-shots-of-paul-walker> [perma.cc/QR3C-J9PH].

17. Ronald E. Franklin, *Audrey Hepburn Resurrected for a New TV Commercial – Is This a Good Thing?*, REELRUNDOWN (Jan. 29, 2019), <https://reelrundown.com/celebrities/Audrey-Hepburn-Resurrected-For-A-New-TV-Commercial-Is-This-A-Good-Thing>; Brie Hiramine, *Bruce Lee Comes Back to Life in Johnnie Walker Ad*, MASHABLE (July 11, 2013), <https://mashable.com/2013/07/11/bruce-lee-for-johnnie-walker/> [perma.cc/MK85-675X].

18. Lisa Respers France, *Chris Evans and others sound off against CGI casting of James Dean*, CNN (Nov. 7, 2019), <https://www.cnn.com/2019/11/07/entertainment/james-dean-cgi-casting-trnd/index.html> [perma.cc/4V6Q-MHXH].

19. *Id.*

20. Zelda Williams, TWITTER (Nov. 6, 2019, 10:07 AM), <https://twitter.com/zeldawilliams/status/1192141551171854338> [perma.cc/64M2-NYX6].

21. France, *supra* note 18.

will force the production to rethink this casting decision.<sup>22</sup>

*Finding Jack* is the exact scenario that this comment seeks to explore.<sup>23</sup> James Dean is being brought back to life with CGI to be cast in a project that is starting decades after his death.<sup>24</sup> Unlike Peter Cushing, James Dean has no past connection to a franchise he already appeared in to justify this decision.<sup>25</sup> Unlike Paul Walker in *Furious 7*, James Dean did not die halfway through production to necessitate the use of CGI.<sup>26</sup> And unlike Bruce Lee and Audrey Hepburn's commercial appearances, this is a feature length film.<sup>27</sup> James Dean is coming back from the dead for a movie that he had no say appearing in.<sup>28</sup>

This comment will analyze the legal history of the right to persona and how those rights extend post-mortem.<sup>29</sup> It will first touch on the science and ethics of bringing deceased actors back to life using digital technology, then focus on case law and state statutes that deal with post-mortem right to publicity.<sup>30</sup> Finally, this paper will focus on the methods actors may use to prevent their digital resurrection, as well as ways that they may ensure and plan for it.<sup>31</sup> The goal is to provide the reader with direction as to how an individual might prepare or prevent their likeness from one day returning to the silver screen.<sup>32</sup>

## II. HOW TO BRING THE DEAD BACK TO LIFE

In order to understand how to protect a person's post-mortem persona rights, it is useful to have a basic knowledge of how to digitally recreate an actor for a performance.<sup>33</sup> To do so, this comment will refer to two categories of techniques hereafter dubbed "Proactive" and "Retroactive" recreation.<sup>34</sup>

### A. Proactive Recreation

Proactive recreation of an actor's likeness is any means that an actor might take while they are alive in order to digitally capture their likeness.<sup>35</sup> To best prepare for a role after death, an actor would want to create a digital

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22. *Id.*

23. Author's original writing.

24. France, *supra* note 18.

25. Author's original writing.

26. *Id.*

27. *Id.*

28. *Id.*

29. *See infra* Part III.

30. *See infra* Part II, III.

31. *See infra* Part IV.

32. *See infra* Part IV.

33. *See infra* Part II.

34. *See infra* Part II.

35. The author is creating this definition.

copy of themselves that is as accurate as possible.<sup>36</sup> With a model of their likeness preserved, a production studio could then manipulate the clone to act in the way the project requires.<sup>37</sup>

The most likely method of this form of recreation are spaces designed with the goal of capturing a full, three-dimensional recording of an actor, such as Microsoft's Mixed Reality Capture Studios.<sup>38</sup> This studio is dedicated to volumetric capture, a process using 106 cameras in an array to record people in full 3D in order to preserve them as holograms.<sup>39</sup> These holograms are a recreation of the subject from any angle, not just one fixed perspective like a single camera.<sup>40</sup>

An actor could enter one of these studios with the intent of making a recording of themselves for future projects.<sup>41</sup> Some artists have already made strides towards taking a scan like this and adding animation after the capture.<sup>42</sup> The studio could accurately record the entire body, mannerisms, and movement of an actor, and an animator manipulating the digital copy could make it do an action that the actor had never originally performed.<sup>43</sup> This could allow the actor's likeness to transcend death in the form of a photorealistic, three-dimensional model that could be inserted into films that the actor never personally participated in.<sup>44</sup>

Many actors have already started creating these digital clones while they are still alive.<sup>45</sup> Tom Cruise had a digital replica of his persona created for *Oblivion* and had it hand-delivered to his home and deleted all other copies.<sup>46</sup> Robin Wright was scanned and replaced for *The Congress*, a movie all about bringing dead actors back to life and making living actors immortal.<sup>47</sup> Digital Domain, one of the leading studios in this field, estimates that they have

36. Author's original idea.

37. CNBC, *This device makes a 3D scan of your entire body in 12 seconds*, (Jan. 11, 2018), <https://www.cnbc.com/video/2018/01/11/this-device-makes-a-3d-scan-of-your-entire-body-in-12-seconds.html> [perma.cc/3YRX-UUJS].

38. Janko Roettgers, *106 Cameras, Holograms and Sticky Tape: Inside Microsoft's Mixed Reality Capture Studios*, VARIETY (Apr. 24, 2018), <https://variety.com/2018/digital/features/microsoft-mixed-reality-capture-behind-the-scenes-1202784950/> [perma.cc/T5NQ-ZSYP].

39. *Id.*

40. *Id.*

41. Tapley & Debrugge, *supra* note 14; Roettgers, *supra* note 38.

42. Pete McNally, *Digital Human Experiments . . .*, PETE MCNALLY'S BLOG (Nov. 23, 2017), <https://petemcnally.com/2017/11/23/digital-human-experiments/>[perma.cc/7C4D-ZM7W]; CNBC, *supra* note 37.

43. Roettgers, *supra* note 38; McNally, *supra* note 42; Sean Higgins, *Next-Level Animation Exploits Photogrammetry*, SPAR3D (Aug. 10, 2015), <https://www.spar3d.com/blogs/the-other-dimension/vol13-no32-photogrammetry-produces-some-gorgeous/> [perma.cc/6TC3-LVC7].

44. Author's original idea.

45. Lucinda Everett, *When will CGI actors replace human ones?*, THE TELEGRAPH (Aug. 15, 2014), <https://www.telegraph.co.uk/culture/film/film-news/11034343/When-will-CGI-actors-replace-human-ones.html> [perma.cc/ZTJ6-3V3M].

46. *Id.*

47. *Id.*; THE CONGRESS (Pandora Filmproduktion 2013).

scanned between fifty and sixty people to preserve their digital likenesses.<sup>48</sup>

### B. Retroactive Recreation

Retroactive recreation is the second and more commonly practiced method of digital recreation of an actor's likeness.<sup>49</sup> This is the type of recreation that involves trying to bring someone back to life who has already died, most commonly in a situation where the actor dies while the movie is still in production.<sup>50</sup> This is typically done by recycling old footage of actors, using filming techniques that block the face, and using CGI to finish production.<sup>51</sup> Retroactive recreation is different from digital de-aging—where an actor is made to look younger through the use of CGI—as retroactive recreation is focused on using CGI to represent dead actors to complete a movie.<sup>52</sup> Generally, Hollywood is comfortable with using CGI recreation for when an actor dies mid-production, either through a sense of duty to the project or a reluctance to start a multimillion dollar movie production from the beginning.<sup>53</sup>

Examples of this method are prevalent. *Furious 7*, the seventh installment in the Fast and the Furious Franchise, saw the untimely death of one of its lead actors, Paul Walker, while the film was in production.<sup>54</sup> In order to deal with this sudden loss, the studio Weta Digital had to composite over 350 CGI shots in order to finish Walker's role.<sup>55</sup> This involved using Walker's brothers as body doubles while Walker's face was digitally recreated or lifted from other shots in the series.<sup>56</sup> The movie was finished successfully, and commentators praised the studio for successfully completing Walker's final performance.<sup>57</sup>

48. Everett, *supra* note 45.

49. The author is creating this definition.

50. The author is creating this definition.

51. Frank Pallotta, *13 Actors Who Were Brought Back To Life With Special Effects In Movies*, BUSINESS INSIDER (Apr. 1, 2014), <https://www.businessinsider.com/actors-brought-back-to-life-with-special-effects-2014-3#now-that-youve-seen-how-cgi-was-used-to-bring-actors-back-to-the-screen--14> [perma.cc/SXT5-KPZ2].

52. See THE CURIOUS CASE OF BENJAMIN BUTTON (Paramount Pictures 2008); see also CAPTAIN MARVEL (Marvel Studios 2019) (providing examples of digital de-aging: Brad Pitt in Button and Samuel L. Jackson were made to look older and younger respectively by adding CGI to their performances).

53. See generally Kate Baucherel, *Does CGI cross ethical boundaries when it depicts deceased actors?*, CENTER FOR DIGITAL ETHICS & POLICY (Feb. 10, 2017), <https://www.digitalethics.org/essays/does-cgi-cross-ethical-boundaries-when-it-depicts-deceased-actors> [perma.cc/ZV75-2XLX].

54. FURIOUS 7 (Universal Studios 2015); Julia Alexander, *Furious 7 used 350 CGI shots of Paul Walker*, POLYGON (Oct. 20, 2015), <https://www.polygon.com/2015/10/20/9577863/furious-7-used-350-cgi-shots-of-paul-walker> [perma.cc/K6BE-WG6F].

55. *Id.*

56. *Id.*

57. Tim Gray, *How the 'Furious 7' Visual Effects Team Worked to Honor Paul Walker's Legacy*, VARIETY (Oct. 15, 2015), <https://variety.com/2015/film/awards/furious-7-visual-effects-paul-walker-1201618224/> [perma.cc/H556-62T5].

Another example of retroactive recreation is Oliver Reed's performance as Proximo in 2000's *Gladiator*.<sup>58</sup> Like Walker, Oliver Reed died while the film was in production.<sup>59</sup> Body doubles, recycling of footage, and a rewriting of the script was used to finish the performance.<sup>60</sup>

Prior to the release of *Star Wars: Rise of Skywalker*, the finale of the latest *Star Wars* trilogy, Disney confirmed that the movie would not feature a retroactive recreation of Carrie Fisher's character Princess Leia.<sup>61</sup> As Fisher's role was important to the story, director J.J. Abrams chose to complete the movie by recycling old shots from the previous film, *The Last Jedi*.<sup>62</sup> This was done with permission from Fisher's family.<sup>63</sup> The movie wrote the script around the lines that Fisher had already recorded, and used digital de-aging on a new actor to complete a flashback scene.<sup>64</sup>

### C. Retroactive Recreation for Completely New Roles

Perhaps the most interesting retroactive recreations are the ones which feature individuals long after they died.<sup>65</sup> In these scenarios, the roles that the actors played were not even contemplated at the time of their passing.<sup>66</sup> The ethics of this type of recreation are hotly debated, with some thinking that the exploitation of someone's likeness without their consent is morally wrong.<sup>67</sup> This category is the focus of this paper, as it is currently new territory in the legal field.<sup>68</sup>

There are two specific examples that illustrate this scenario. The first is the aforementioned role of Peter Cushing in *Rogue One*, the second is Tupac

58. *GLADIATOR* (Universal Pictures 2000); Pallotta, *supra* note 51.

59. *Id.*

60. *Id.*

61. *STAR WARS: THE RISE OF SKYWALKER* (Lucasfilm Ltd. 2017); Sam Machkovech, *Lucasfilm: Carrie Fisher will not return to Star Wars in CGI form*, *ARS TECHNICA* (Jan. 15, 2017), <https://arstechnica.com/gaming/2017/01/lucasfilm-carrie-fisher-will-not-return-to-star-wars-in-cgi-form/> [perma.cc/F6XU-BMUG].

62. Jake Kleinman, *'Rise of Skywalker' VFX Boss Sets the Record Straight on Leia, CGI, Maz, and More*, *INVERSE* (Jan. 7, 2020), <https://www.inverse.com/article/62140-rise-of-skywalker-leia-vfx-cgi-flashback-explained-interview> [perma.cc/Y295-VFZY]; Industrial Light and Magic, *ILM Behind the Magic: The Visual Effects of Star Wars: The Rise of Skywalker*, *YOUTUBE* (Feb. 4, 2020), <https://www.youtube.com/watch?v=Z9d1bkRC0Hs> [perma.cc/73ZC-APAT].

63. Alex Stedman, *'Star Wars': J.J. Abrams Says Carrie Fisher Is 'the Heart of' 'Rise of Skywalker'*, *VARIETY* (Aug. 24, 2019), <https://variety.com/2019/film/news/star-wars-carrie-fisher-rise-of-skywalker-jj-abrams-1203313178/> [perma.cc/9BPR-ZH2L].

64. Lucasfilm, *supra* note 61.

65. Author's opinion.

66. Author's definition.

67. Rich Haridy, *The ethics of digitally resurrecting actors*, *NEW ATLAS* (Dec. 28, 2016), <https://newatlas.com/star-wars-ethics-digital-actors-cg/47123/> [perma.cc/4CE8-5KNM].

68. *Infra* Part II.C.

Shakur's appearance at Coachella 2012.<sup>69</sup>

### 1. Peter Cushing — *Rogue One*

Peter Cushing starred in the original *Star Wars* film in 1977 as the villain Grand Moff Tarkin, supervisor of the Death Star.<sup>70</sup> For the 2016 prequel film *Rogue One*, Lucasfilm and Disney felt that Cushing's character was vital to the story and enlisted the talent of the special effects studio Industrial Light and Magic to digitally recreate Cushing's persona.<sup>71</sup> Peter Cushing died in 1994 from prostate cancer, twenty years before production of *Rogue One* had begun, and five years before the next trilogy of *Star Wars* movies would begin.<sup>72</sup> This factor is what sets this movie apart from others like *Gladiator* or *Furious 7*; movie production had not begun when the actor died.<sup>73</sup>

Disney and Lucasfilm sought the permission of Joyce Brighton, Cushing's secretary and overseer of his estate, to use his likeness in the project.<sup>74</sup> The details of the arrangement made with the estate are covered by a confidentiality agreement and are unknown to the public, but it is fair to speculate that there was some compensation involved for the persona rights.<sup>75</sup> Cushing's will did not feature any language addressing the use of his likeness in movies after his death.<sup>76</sup> Cushing's will is simple and short, and his remainder clause instructs that following his death, his remaining assets be sold and the proceeds given to Brighton.<sup>77</sup>

It is also worth noting that there was an fortunate set of circumstances that made Cushing's retroactive recreation possible: the actor had created a resin mold of his face, a "lifecast," in the 1980's.<sup>78</sup> The team at Industrial Light and Magic were able to take 3D scans of the resin duplicate in order to have a perfect model of Cushing's face to digitally insert over the actor

69. Tapley & Debruge, *supra* note 14; Aaron Dodson, *The strange legacy of Tupac's 'hologram' lives on five years after its historic debut Coachella debut*, THE UNDEFEATED (Apr. 14, 2017), <https://theundefeated.com/features/the-strange-legacy-of-tupacs-hologram-after-coachella/> [perma.cc/3WN8-DFUR].

70. STAR WARS (Lucasfilm Ltd. 1977); *Peter Cushing: Biography*, IMDB, <https://www.imdb.com/name/nm0001088/bio> (last visited Oct. 19, 2019) [perma.cc/HV8L-N2WZ]; *Grand Moff Tarkin*, STAR WARS DATABANK, <https://www.starwars.com/databank/grand-moff-tarkin> [perma.cc/7U95-WL6K] (last visited Oct. 19, 2019).

71. Lucasfilm, *supra* note 13; Tapley & Debruge, *supra* note 14.

72. IMDB, *supra* note 70.

73. Lucasfilm, *supra* note 13; Tapley & Debruge, *supra* note 14.

74. Lucasfilm, *supra* note 13; Tapley & Debruge, *supra* note 14.

75. Lucasfilm, *supra* note 13; Tapley & Debruge, *supra* note 14.

76. *See infra* Appendix A.

77. *See infra* Appendix A.

78. WIRED, *How 'Rogue One' Recreated Grand Moff Tarkin | Design FX | WIRED*, YOUTUBE (Feb. 21, 2017), <https://www.youtube.com/watch?v=OUIHzanm5Mk> [perma.cc/WJ6P-4CHF]; *Helping bring Grand Moff Tarkin back to Star Wars*, TOMSPINADESIGNS, <http://www.tomspinadesigns.com/news/media/grand-moff-tarkin-lifecast-rogue-one/> [perma.cc/7M8J-8SWT] (last visited Oct. 19, 2019).



portraying Cushing's body.<sup>79</sup> This incredibly lucky occurrence was what made the recreation possible.<sup>80</sup> As such, it is a reasonable conclusion that currently deceased actors without a highly detailed lifecast are unlikely to make an appearance in modern movies due to a lack of high fidelity sources for a perfect recreation.<sup>81</sup> However, present day actors taking steps to preserve detailed recreations of their likeness through the use of a three-dimensional capture stage like Microsoft's Mixed Reality Capture Studios give this type of Retroactive Recreation a potential future.<sup>82</sup>

## 2. Tupac Shakur — Coachella 2012

While not an actor like the other examples, Tupac Shakur was “brought back to life” in the form of a hologram to perform alongside Dr. Dre and Snoop Dog on April 15, 2012, at day three of the 2012 Coachella Valley Music and Arts Festival in California.<sup>83</sup> Shakur was killed in a drive-by shooting in Las Vegas in 1996, nearly two decades before his persona's appearance onstage at Coachella.<sup>84</sup>

Tupac's hologram performed “Hail Mary” and “2 of Amerikaz Most Wanted” with Dr. Dre and Snoop Dog to a crowd of 80,000.<sup>85</sup> Dr. Dre sought the help of studio Digital Domain to digitally recreate Shakur for the event, with the animated 3D model projected as a “hologram” illusion to appear lifelike.<sup>86</sup> Dr. Dre received the permission of Afeni Shakur, Tupac's mother, in order to use her son's likeness in the performance.<sup>87</sup> Shakur's estate profited from the event, with Tupac's top two singles earning over 33,000 downloads and a 500% increase in album sales afterwards.<sup>88</sup>

The Coachella performance is analogous to Cushing's role in *Rogue One*, as this is an instance where the subject had been deceased for years before work began and was digitally brought back to life with the estate's consent.<sup>89</sup> Like Peter Cushing's connection to *Star Wars*, Tupac had a preexisting connection to the likeness's performance, his friendship with Dr. Dre.<sup>90</sup> While there were talks of taking the hologram on tour, the recreated

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79. *Id.*

80. *Id.*

81. Author's opinion.

82. *See supra* Part II.A.

83. Dodson, *supra* note 69.

84. *Rapper Tupac Shakur Gunned Down*, MTV (Sept. 13, 1996), <http://www.mtv.com/news/1434032/rapper-tupac-shakur-gunned-down/> [perma.cc/P84D-PZQL].

85. Dodson, *supra* note 69.

86. *Id.*

87. *Id.*

88. *Tupac Shakur Holographic Performance*, EMN8 CREATIVE, <https://www.emn8creative.com/coachella-tupac-holographic-performance> [perma.cc/8CR8-TFCG] (last visited Oct. 19, 2019).

89. *See supra* Part II.C.1.

90. Author's original writing.

persona of Tupac has not made an appearance since 2012.<sup>91</sup>

### 3. Other Examples

In the season one finale of the 2019 *Twilight Zone* reboot, Rod Serling, the creator of the original 1950's series, returns as a CGI persona.<sup>92</sup> Like in *Rogue One*, Serling is recreated by layering CGI over a body actor with an impersonator doing the voice work.<sup>93</sup> Rod Serling passed away in 1975, almost fifty years before his recreation.<sup>94</sup> Like Tupac and Cushing, Serling's persona has a preexisting connection to justify reappearance, as Serling was the host of the original show.<sup>95</sup>

Other examples have used digital recreations of famous actors to sell products.<sup>96</sup> In 2013, an animated model of martial artist Bruce Lee was used in a commercial for Johnnie Walker Blue Label whiskey.<sup>97</sup> Of note is the fact that Lee did not drink alcohol, yet his image was used to sell it.<sup>98</sup> Lee died in 1973.<sup>99</sup> In 2014, Audrey Hepburn's sons sold her image to Galaxy Chocolate for an appearance in a commercial.<sup>100</sup> The ad featured body doubles and a digital facial reconstruction of the famous *Breakfast at Tiffany's* actress.<sup>101</sup> Hepburn died in 1993.<sup>102</sup>

#### D. The Challenges of Bringing the Dead Back to Life

Recreating someone's performance is a difficult and expensive process. In order to establish how one should prepare their estate for a posthumous role, important questions must first be defined.<sup>103</sup>

91. Dodson, *supra* note 69.

92. Josh Weiss, *Meta Season 1 Finale of The New 'Twilight Zone' Is a Nod to Season 1 Finale of the Original Series*, FORBES (May 30, 2019), <https://www.forbes.com/sites/joshweiss/2019/05/30/meta-season-1-finale-of-the-new-twilight-zone-is-a-nod-to-season-1-finale-of-the-original-series/#3018141f4b43> [perma.cc/PS2Z-82GP].

93. *Id.*

94. *Id.*

95. *Id.*

96. *See infra* notes 97–102.

97. Hannah Ellis-Petersen, *Bruce Lee, Audrey Hepburn, and the ethics of digital necromancy*, THE GUARDIAN (Apr. 10, 2015), <https://www.theguardian.com/culture/2015/apr/10/bruce-lee-audrey-hepburn-ethics-digital-necromancy> [perma.cc/YUV9-7M3U].

98. *Id.*

99. *Bruce Lee: Biography*, IMDB, [https://www.imdb.com/name/nm0000045/?ref\\_=nv\\_sr\\_srsrg\\_0](https://www.imdb.com/name/nm0000045/?ref_=nv_sr_srsrg_0) (last visited Jan. 17, 2019) [perma.cc/J2XB-3A7E].

100. *Behind the Scenes from the Making of 2014 Galaxy Chocolate Commercial With Audrey Hepburn*, VINTAGE EVERYDAY (Dec. 10, 2018), <https://www.vintag.es/2018/12/audrey-hepburn-dove-chocolate-commercial.html> [perma.cc/E4AX-KSF6].

101. *Id.*

102. *Audrey Hepburn: Biography*, IMDB, [https://www.imdb.com/name/nm0000030/?ref\\_=nv\\_sr\\_srsrg\\_0](https://www.imdb.com/name/nm0000030/?ref_=nv_sr_srsrg_0) (last visited Jan. 17, 2019) [perma.cc/W22P-N754].

103. Author's opinion.

### 1. Legal Issues

The question remains of whether an actor even has the legal right to their persona.<sup>104</sup> This comment will next explore the statutory and binding case law on the issue.<sup>105</sup> Further, an analysis of copyrightable characters and the relationship between the actors that play them is needed to set the boundaries of the persona right.<sup>106</sup> Following this is an exploration of the methods an actor may use to either protect that right or set restrictions on its use.<sup>107</sup> Finally, how should the issue be addressed in cases where the decedent died intestate or without planning for a posthumous role?<sup>108</sup>

### 2. Artistic Issues

As an aside before the legal analysis, it is important to recognize that recreating people relies on the visual effects industry overcoming the hurdles of the “uncanny valley.”<sup>109</sup> Most artists agree that CGI recreations of humans, while impressive, still do not look and behave exactly the way a real human does.<sup>110</sup> This failure to perfectly recreate a human face is often referred to as the “uncanny valley,” a gray area of portraying something between stylized and realistic.<sup>111</sup> Human brains are subconsciously able to notice extremely minor and slight discrepancies in the way that a digital face moves in comparison to a real face, making the viewer uncomfortable and ruining the illusion of realism that digital recreation seeks to accomplish.<sup>112</sup> Even Cushing’s Tarkin performance in *Rogue One*, while one of the most impressive uses of the technology, still falls victim to the uneasiness of the uncanny valley.<sup>113</sup> If recreation technology does not get to the point where a performance is 100% believable, directors may make the creative decision to never use it, effectively negating any reason to address the legal issues.<sup>114</sup> This paper assumes that the technology will be perfected, that the uncanny valley will be crossed, and that these legal issues will become relevant in due time.<sup>115</sup>

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104. See *infra* Part III.A.

105. See *infra* Part III.

106. See *infra* Part IV.

107. See *infra* Part IV, V.

108. See *infra* Part V.C.

109. *Uncanny Valley*, TECHNOPEdia, <https://www.techopedia.com/definition/31570/uncanny-valley> [perma.cc/E4RP-QR4F] (last visited Oct. 19, 2019).

110. Natalie Wolchover, *Why CGI Humans Are Creepy, and What Scientists Are Doing about It*, LIVESCIENCE (Oct. 11, 2019), <https://www.livescience.com/16600-cgi-humans-creepy-scientists.html> [perma.cc/G3RW-HSGH].

111. *Id.*

112. *Id.*

113. Haridy, *supra* note 67.

114. Author’s opinion.

115. See *infra* Parts II–V.

### III. A SYNERGY — DIGITAL IMMORTALITY COUPLED WITH LEGAL IMMORTALITY

In order to understand how one might protect their persona past death, the right do so while the individual is alive needs exploring.<sup>116</sup> Some of the broader principles for protecting a persona while alive transfer over to how the persona is treated after death, and these cases lay the groundwork for the current state of the law in this field.<sup>117</sup>

#### A. The Right to Publicity

The right to publicity is a tort; it allows a plaintiff to seek a remedy for the unauthorized use of an individual's name or likeness, and stems from the common law right to privacy.<sup>118</sup> There are two main issues in right to publicity cases: the value of the plaintiff's identity and the value of the plaintiff's performance.<sup>119</sup> The Second Circuit in the 1953 case *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.* created the term "right to publicity."<sup>120</sup> The court held that an individual may have a property right in their name, image, and likeness.<sup>121</sup>

The *Haelan* case involved a famous baseball player who had contracted with a bubblegum manufacturer to have his name and likeness appear on the products for promotion.<sup>122</sup> A rival bubblegum company induced the player to enter into a similar contract for their product with full knowledge of the existing contract.<sup>123</sup> The court recognized that the baseball player had a right to control the commercial use of his own likeness as a method of enforcing the common law privacy tort of appropriation.<sup>124</sup> *Haelan* thus separated the right of publicity from the right of privacy, making it wrongful to use a person's name, voice, or photo to sell a product without their permission.<sup>125</sup>

*Zacchini v. Scripps-Howard Broadcasting Co.* is the only time where the Supreme Court has weighed in on the issue of the right to publicity, upholding its constitutionality in the abstract.<sup>126</sup> The *Scripps* case focused on the plaintiff's performance value in a right to publicity action.<sup>127</sup> In *Scripps*, the defendant television company recorded and broadcast the entirety of

116. See *infra* Part III.A.

117. See *infra* Part III.

118. See RESTATEMENT (SECOND) OF TORTS, § 652C (AM LAW INST. 1977).

119. J. Thomas McCarthy, *The Human Persona as Commercial Property: The Right of Publicity*, 19 COLUM. VLA J.L. & ARTS 129, 133 (1995); see *infra* Part III.A.

120. *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868 (2d Cir. 1953).

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. McCarthy, *supra* note 119.

126. *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977).

127. *Id.* at 564.

Zacchini's "human cannonball" act on the local news without his consent.<sup>128</sup> Zacchini sued for damages on the theory that Scripps-Howard had appropriated his professional likeness and threatened the economic value of his performance.<sup>129</sup> The Supreme Court ruled for Zacchini, concluding the Ohio statute protected against "not the appropriation of an entertainer's reputation to enhance the attractiveness of a commercial product, but the appropriation of the very activity by which the entertainer acquired his reputation in the first place."<sup>130</sup>

Right of publicity actions have also found success in suits over the misappropriation of a voice identity.<sup>131</sup> In *Midler v. Ford Motor Co.*, Ford Motors tried to hire famous singer Bette Midler to sing in an advertising jingle for a car commercial.<sup>132</sup> When Midler refused, Ford's advertisers hired one of Midler's backup singers to do the advertisement.<sup>133</sup> The singer replicated Midler's voice to sound exactly like Midler, so much so that the public thought Midler was the one performing.<sup>134</sup> Midler brought a right to publicity claim and succeeded in showing that an attribute such as a voice can be an appropriation of a person's likeness.<sup>135</sup>

The totality of circumstances can rise to a level of misappropriation of identity as well.<sup>136</sup> In *White v. Samsung*, an advertisement featured a robotic version of Wheel of Fortune hostess Vanna White to sell VCRs.<sup>137</sup> Samsung dressed the robot like White and placed it next to large scale letters in the vein of Wheel of Fortune.<sup>138</sup> Because of the surrounding context of the ad—the wording, the appearance of the robot—Samsung was using readily identifiable images to portray White and profit off of her identity. The Ninth Circuit held that Samsung was using White's fame to sell products and that this was an infringement on her right to publicity.<sup>139</sup>

A party can consent to the commercial usage of their likeness, but the scope of consent is not unlimited.<sup>140</sup> For example, the consent to have a photograph taken does not inherently imply a consent to have that photograph used for a commercial purpose.<sup>141</sup> In order to have the standing to bring a claim, the defendant's infringing use of the plaintiff's image must directly

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128. *Id.*

129. *Id.* at 564.

130. *Id.* at 576.

131. *Midler v. Ford Motor Co.*, 849 F.2d 460, 461 (9th Cir. 1988).

132. *Id.*

133. *Id.* at 461–62.

134. *Id.* at 462.

135. *Id.* at 465.

136. *White v. Samsung Elecs. America, Inc.*, 971 F.2d 1395, 1396 (9th Cir. 1992).

137. *Id.*

138. *Id.* at 1401.

139. *Id.* at 1399.

140. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46 (AM. LAW INST. 1995).

141. *Id.*

identify the plaintiff.<sup>142</sup> The defendant's use need not be for advertising purposes, and not necessarily for money.<sup>143</sup>

In summary, the right of publicity "has since come to signify the right of an individual, especially a public figure or a celebrity, to control the commercial value and exploitation of his name and picture or likeness and to prevent others from unfairly appropriating this value for their commercial benefit."<sup>144</sup> The typical elements of a right to publicity claim are "(1) an appropriation of one's name or likeness, (2) without one's consent, and (3) for another's commercial benefit."<sup>145</sup> The plaintiff must also be identified by the defendant's usage in order to bring a successful claim.<sup>146</sup> This is a question of fact for the court to decide.<sup>147</sup> Currently, over twenty states have recognized the right by statute, while the majority have some form of common law precedent supporting the right.<sup>148</sup> The right to publicity is subject to a First Amendment free speech defense, such as matters of public interest or public figures.<sup>149</sup>

State right of publicity laws can exist in harmony with current federal patent and copyright law.<sup>150</sup> While the *Scripps* and *Haelan* decisions validated the idea of the right to publicity, there is currently no federal based right to publicity, with some states recognizing the right through statutes and others through common law.<sup>151</sup> It is this comment's assertion that, while a federal standard would be massively beneficial, the right to publicity for the sake of recreating a persona after death can be protected through the means of contracts, wills, and estate planning.<sup>152</sup> This solution avoids legislative hurdles and creates a "practical" solution that is currently available without any further steps.<sup>153</sup>

### B. Character Versus Actor

An important distinction to make is the difference between the actor and the character that they portray on the screen.<sup>154</sup> In most acting contracts, the

142. RESTATEMENT (SECOND) OF TORTS, § 652C (AM LAW INST. 1977).

143. *Id.*

144. Estate of Elvis Presley v. Russen, 513 F. Supp. 1339, 1353 (D.N.J. 1981).

145. 62A AM. JUR. 2D Privacy § 62 (2020).

146. *Id.*

147. *Id.*

148. Jonathan Faber, *A Brief History of the Right of Publicity*, RIGHTOFPUBLICITY.COM, <https://rightofpublicity.com/brief-history-of-rop> [perma.cc/WHYB-3M2L] (last visited Nov. 9, 2019).

149. *Id.*

150. *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1100 (9th Cir. 1992).

151. RESTATEMENT (SECOND) OF TORTS, § 652C (AM LAW INST. 1977); Jennifer L. Carpenter, *Internet Publication: The Case for an Expanded Right of Publicity for Non-Celebrities*, 6 VA. J. L. & TECH. 1522, 1687 (2001) (discussing the history, origin, and present status of the right of publicity).

152. Author's original writing.

153. *Id.*

154. *See infra* Part III.B.

actor gives the studio a property right in the actor's portrayal of the character.<sup>155</sup> The standard Screen Actors Guild contract states that the actor gives the producer "the right to use and give publicity to the performer's name and likeness . . . to recordings [sic] and reproductions of the performer's voice . . . in connection with the advertising and exploitation of said photoplay."<sup>156</sup> Meanwhile, the character is the intellectual property of the studio, and is an entity protected by copyright or trademark.<sup>157</sup> As a fictional entity, the character does not have rights that are protected by the right of publicity.<sup>158</sup>

Actor Crispin Glover portrayed the character of George McFly in the 1985 film *Back to the Future*.<sup>159</sup> For the sequels, rather than pay Glover the \$1 million requested to return to the role, the production fitted a look-alike with face prosthetics to appear like Glover.<sup>160</sup> Glover sued Universal for misappropriation of likeness, however the case was subsequently settled out of court.<sup>161</sup> The Screen Actors Guild has since changed their rules on reusing footage or impersonating actors to portray a character as a means to prevent this situation from happening again.<sup>162</sup>

Similarly, for characters portraying a likeness in an artificial manner (like CGI or robots), the closest case on point is *Wendt v. Host International*.<sup>163</sup> In *Wendt*, a company operating airport bars obtained the license to open bars themed on the television show *Cheers*.<sup>164</sup> Host International planned to place animatronic figures that would sit at the bar and make comments that *Cheers* characters Cliff Calvin and Norm Peterson would say.<sup>165</sup> The robots were designed and dressed in a way that vaguely resembled their characters.<sup>166</sup> The actors that portrayed Cliff and Norm, John Ratzenberger and George Wendt, brought suit alleging a violation of their rights of publicity.<sup>167</sup>

On appeal, the Ninth Circuit decided that the district court's ruling of summary judgement was inappropriate; there were material facts regarding

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155. See SAG-AFTRA, *Producer – SAG-AFTRA Codified Basic Agreement of 2014*, 330, [https://www.sagaftra.org/files/2014\\_sag-aftra\\_cba\\_1.pdf](https://www.sagaftra.org/files/2014_sag-aftra_cba_1.pdf) [perma.cc/3LRG-AEJV] (last visited Nov. 2, 2019).

156. *Id.*

157. See Charles W. Grimes, Gregory J. Battersby, *THE LAW OF MERCHANDISING AND CHARACTER LICENSING: MERCHANDISING LAW AND PRACTICE* (2019–2020 ed.).

158. See *Burck v. Mars, Inc.*, 571 F. Supp. 2d 446, 453 (S.D. N.Y. 2008) ("The Naked Cowboy is not a living person, but a character Burck takes on when performing.").

159. *BACK TO THE FUTURE* (Universal Pictures 1985).

160. *Id.*; *BACK TO THE FUTURE PART III* (Universal Pictures 1990); Eric Gardner, "Back to the Future II" *From a Legal Perspective: Unintentionally Visionary*, *THE HOLLYWOOD REPORTER* (Oct. 21, 2015), <https://www.hollywoodreporter.com/thr-esq/back-future-ii-a-legal-833705> [perma.cc/23H5-MBPK].

161. Gardner, *supra* note 160.

162. *Id.*

163. *Wendt v. Host Int'l, Inc.*, 125 F.3d 806 (9th Cir. 1997).

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

“[t]he degree to which these robots resemble, caricature, or bear an impressionistic resemblance to the appellants.”<sup>168</sup> On whether the robots’ appearance was an appropriation of the plaintiffs’ likeness, the court concluded that “an actor or actress does not lose the right to control the commercial exploitation of his or her likeness by portraying a fictional character.”<sup>169</sup> However, the question ultimately went unanswered, as the case was settled out of court.<sup>170</sup>

Returning once again to the example of Peter Cushing and his performance, Lucasfilm owns the character of Grand Moff Tarkin and the depiction of him by Cushing.<sup>171</sup> In 2005’s prequel film *Star Wars: Episode III - Revenge of the Sith*, Tarkin makes an appearance in the background of a single shot towards the end of the film.<sup>172</sup> This depiction of Tarkin was played by a lookalike actor to Cushing, and since the character is owned by Lucasfilm, Cushing’s estate would have no cause of action to receive credit for this performance.<sup>173</sup> This is different than the *Back to the Future II* controversy since Cushing was dead during production, while Glover was not.<sup>174</sup> Universal was trying to avoid paying Glover to reprise his character, whereas Lucasfilm hired the look-alike to replace the deceased Cushing.<sup>175</sup> This difference between character and actor is also why Disney and Lucasfilm are able to portray Tarkin as looking like Cushing in expanded media such as the *Marvel Star Wars* comic series.<sup>176</sup>

Since both the *Cheers* and *Back to the Future* cases settled out of court, it is currently unknown what the legal limits of the distinction between character and actor are.<sup>177</sup> However, courts have been willing to pursue an appropriation suit for exploitation when the actor and the fictional character are inseparable in the public’s mind.<sup>178</sup> Additionally, this subsection of right to publicity can easily be negotiated in a contract in a clause outlining what the boundaries of the actor’s role and the studio’s character are and how they overlap.<sup>179</sup>

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168. *Id.*

169. *Id.* at 811.

170. ‘*Cheers*’ lawsuit happily settled, SUNDAY STAR-NEWS, June 24, 2001, at 4D [perma.cc/BT72-PBNN].

171. Battersby & Grimes, *supra* note 157.

172. STAR WARS: EPISODE III – REVENGE OF THE SITH (Lucasfilm Ltd. 2005).

173. Wayne Pyram: *Biography*, IMDB, [https://www.imdb.com/name/nm0701460/?ref\\_=ttfc\\_fc\\_cl\\_t14](https://www.imdb.com/name/nm0701460/?ref_=ttfc_fc_cl_t14) [perma.cc/P65L-3MTH] (last visited Nov. 2, 2019).

174. *See supra* notes 159–62.

175. *See supra* Part II.C.1.

176. Charles Soule, *Star Wars: Darth Vader: Dark Lord of the Sith 18: Bad Ground*, MARVEL COMICS, July 11, 2018.

177. *See supra* notes 159–70.

178. *See Landham v. Lewis Galoob Toys, Inc.*, 227 F.3d 619, 625 (6th Cir. 2000).

179. Author’s opinion; *see generally* SAG-AFTRA, *supra* note 155.



### C. *The Commercial Use of a Likeness of a Dead Actor*

While there is a difference between character and actor, a studio's use of that actor's portrayal after the actor's death may be called into question by the actor's heirs.<sup>180</sup> One of the most notable cases of the likeness of a character portrayed by a deceased actor comes from *Lugosi v. Universal Pictures*.<sup>181</sup> Bela Lugosi, made famous for his portrayal of Dracula in the eponymous 1931 film, was featured prominently in the merchandising of the movie in the decades following.<sup>182</sup> His heirs sued Universal for the unauthorized commercial use of Lugosi's image.<sup>183</sup> The court focused on the property right of the deceased and his heirs rather than on Lugosi's ownership of the Dracula character.<sup>184</sup> The California Supreme Court ultimately concluded that a dead person does not have a property right to their likeness that can pass to their heirs.<sup>185</sup> This decision was in line with previous opinions concluding that the right to privacy ends at death.<sup>186</sup>

The *Lugosi* case established that once the actor is dead, the studio can use the actor's portrayal of the studio's intellectual property without limit.<sup>187</sup> However, this standard did not last long, as many state legislatures soon began passing state laws that grant post-mortem rights to publicity.<sup>188</sup>

#### 1. *State-Based Post-mortem Rights to Publicity*

In response to the *Lugosi* decision, the California State Legislature passed the California Celebrities Rights Act of 1986.<sup>189</sup> This act creates an inheritable persona right for up to seventy years after death.<sup>190</sup> This act grants statutory post-mortem rights, providing the families and descendants of deceased personalities the ability to recover for the use of their likeness.<sup>191</sup> California Supreme Court Chief Justice Bird's dissent in *Legosi*, succinctly states the rationale for why the right to publicity should exist post-mortem:

[G]ranteeing protection after death provides an increased incentive for the investment of resources in one's profession, which may augment the value of one's right of publicity. If the right is descendible, the individual is able

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180. See *infra* Part III. C.

181. *Lugosi v. Universal Pictures*, 25 Cal. 3d 813 (1979).

182. *Id.* at 817.

183. *Id.*

184. *Id.* at 844.

185. *Id.* at 825.

186. *James v. Screen Gems, Inc.*, 344 P.2d 799 (1959).

187. See *Lugosi v. Universal Pictures*, 25 Cal. 3d 813 (1979).

188. See *infra* Part III.C.1.

189. CAL. CIV. CODE § 3344.1 (West, Westlaw through Ch. 3 of 2020 Reg. Sess.).

190. *Id.*

191. *Id.*

to transfer the benefits of his labor to his immediate successors and is assured that control over the exercise of the right can be vested in a suitable beneficiary. There is no reason why, upon a celebrity's death, advertisers should receive a windfall in the form of freedom to use with impunity the name or likeness of the deceased celebrity who may have worked his or her entire life to attain celebrity status. The financial benefits of that labor should go to the celebrity's heirs. . . .<sup>192</sup>

Because of California's position in the entertainment industry, California's statute is important to focus on due to the likelihood that an actor will probably fall under that jurisdiction.<sup>193</sup> Section 3344.1's adoption is largely attributed to Robyn Astaire, the widow of Fred Astaire, for her efforts to protect her late husband's image from unauthorized commercial use after his death.<sup>194</sup>

For a plaintiff to recover under the California statute, there must be a "knowing" use of person's name or likeness without the person's consent.<sup>195</sup> Courts have imposed a three-step test to analyze a claim: "(1) Was there a knowing use of the plaintiff's protected identity? (2) Was the use for advertising purposes? (3) Was there a direct connection between the use and the commercial purpose?"<sup>196</sup> If every question is answered in the affirmative, the statute has been violated.<sup>197</sup>

The statute allows recovery for both living actors that have had their likeness appropriated, as well as for the heirs of a deceased public figure, as the publicity right is transferable at death.<sup>198</sup> The right is freely licensable, transferable, and a descendible property right which lasts for seventy years.<sup>199</sup> Before recovery may take place, the holder of the deceased person's publicity right must first register the claim with the California Secretary of State.<sup>200</sup> The deceased person's identity must have had "commercial value at the time of his or her death, or because of his or her death."<sup>201</sup> In typical right to publicity actions, whether an actor is famous enough for the right of publicity to apply is a matter of law; the California statute only uses the broad definition of a "personality."<sup>202</sup> Additionally, there is an exemption for a deceased person's identity used in a "play, book, magazine, newspaper, musical composition, audiovisual work, radio or television program, single

192. *Lugosi*, 25 Cal. 3d at 846.

193. Author's opinion.

194. Faber, *supra* note 148.

195. *California Right of Publicity Law*, DIGITAL MEDIA LAW PROJECT, <http://www.dmlp.org/legal-guide/texas-right-publicity-law>, [perma.cc/W9BH-LWBF] (last visited Nov. 9, 2019).

196. *See Newcombe v. Adolf Coors Co.*, 157 F.3d 686, 692 (9th Cir. 1998).

197. *Id.*

198. CAL. CIV. CODE §§ 3344, 3344(a).

199. *Id.*

200. *See id.* § 3344.1(f)(1).

201. *See id.* § 3344.1(h).

202. *See id.* § 3344(e).

and original work of art, work of political or newsworthy value,” or an advertisement for any of these works.<sup>203</sup>

The first state granting statutory post-mortem publicity rights was Tennessee with the Personal Rights Protection Act of 1984.<sup>204</sup> Unsurprisingly, the law of publicity in Tennessee has been driven by the estate of Elvis Presley.<sup>205</sup> The Personal Rights Protection Act of 1984 provides “freely assignable and licensable” property rights in the use of one’s “name, photograph, or likeness.”<sup>206</sup> These rights are violated by the commercial use of someone’s likeness without their consent.<sup>207</sup> The statute specifically grants post-mortem rights.<sup>208</sup> These rights are protected for ten years after death, but can continue in perpetuity contingent on the right’s continued use by the estate or by assignment.<sup>209</sup>

The Texas statute outlining the post-mortem right to publicity lies in Title IV of the Property Code and establishes that “an individual has a property right in the use of the individual’s name, voice, signature, photograph, or likeness after the death of the individual.”<sup>210</sup> The 1987 statute was introduced as the “Buddy Holly Bill,” and similar to Elvis, was put into effect so that the family of the late music icon could recover for further wrongful appropriation of Holly’s identity.<sup>211</sup>

The Texas statute works like the California statute: a person may not use a deceased person’s right to publicity for commercial uses without written consent.<sup>212</sup> The right is a descendible, transferable property right, and if not transferred before or upon death, it vests in the deceased’s spouse and children.<sup>213</sup> Like the California statute, the right holder must register the property right claim with Texas’s Secretary of State within the first year of the individual’s death, though for any claim after the first year registration is not necessary.<sup>214</sup> This claim will prevail over a conflicting claim that is unregistered.<sup>215</sup> After a year, the owner of the right may exercise the publicity right regardless if their property right claim is registered.<sup>216</sup> Texas

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203. *See id.* § 3344(a)(2).

204. TENN. CODE ANN. § 47-25-1101 (West, through 020 First Reg. Sess. of the 111th Tennessee General Assembly, eff. through March 10, 2020 (Public Act 532)).

205. *Tennessee*, ROTHMAN’S ROADMAP TO THE RIGHT OF PUBLICITY, <https://www.rightofpublicityroadmap.com/law/Tennessee> [perma.cc/4EWY-NLVS] (last visited Nov. 9, 2019).

206. TENN. CODE ANN. § 47-25-1101.

207. *Id.*

208. *Id.*

209. *Id.*

210. TEX. PROP. CODE ANN. § 26.002.

211. *Texas Right of Publicity Law*, DIGITAL MEDIA LAW PROJECT, <http://www.dmlp.org/legal-guide/texas-right-publicity-law> [perma.cc/73H7-HYZM] (last visited Nov. 9, 2019).

212. TEX. PROP. CODE ANN. § 26.011.

213. *See id.* § 26.004-.005.

214. *See id.* § 26.006-.008.

215. *See id.* § 26.007.

216. *See id.* § 26.009.

protects the right for fifty years, and the statute of limitations to bring a claim is two years.<sup>217</sup>

New York is another potential hub for actors with its own right to publicity laws.<sup>218</sup> Article V of the N.Y. Civil Rights Law define the right, with section 50 making a violation to rights of publicity a misdemeanor, while section 51 provides a private cause of action.<sup>219</sup> The statute protects a person's name, portrait, picture, and voice from use in a commercial capacity without the owner's permission.<sup>220</sup> However, unlike California and Texas, New York does not recognize a posthumous right of publicity.<sup>221</sup> As such, a New York actor's right to publicity cannot be transferred to another after death, leaving the actor's heirs no way to recover for an unauthorized use of the deceased's persona.<sup>222</sup> New York is a minority in refusing to honor the right to publicity past death.<sup>223</sup>

There is also the issue of how states treat separate property versus marital property and how this affects the property right granted by the statutes.<sup>224</sup> In community property jurisdictions, property gained prior to the marriage is considered separate, and upon divorce, the property is not divided.<sup>225</sup> Property gained by one spouse during the marriage gives the other spouse a 50% interest in the property.<sup>226</sup> In separate property jurisdictions, spouses do not gain into rights in the other's property.<sup>227</sup> How this affects the publicity right is itself a topic worth writing about, especially in situations where fame and publicity status is gained as a result of a marriage.<sup>228</sup> However, for the purposes of this comment, the reader should simply be aware that the community property distinction is an issue that may present itself depending on the scenario, and that a typical analysis should apply.<sup>229</sup>

## 2. Federal Right to Post-mortem Publicity

All of the state statutes have their own minor differences.<sup>230</sup> There is no federal-level right to publicity, living or dead, leaving the nation in a

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217. TEX. CIV. PRAC. & REM. CODE § 16.003(a).

218. N. Y. CIV. RIGHTS §§ 50, 51 (West, Westlaw through L.2019, chapter 758 & L.2020, chapter 23).

219. *See id.* §§ 50, 51.

220. *See id.* § 51.

221. *Mirone v. MacMillan*, 894 F.2d 579, 585 (2d Cir. 1990).

222. *Id.*

223. Faber, *supra* note 148.

224. Author's original writing.

225. 15B AM. JUR. 2D COMMUNITY PROPERTY § 28 (2020).

226. *Id.*

227. *Id.* § 27.

228. Author's original writing.

229. *Id.*

230. *See supra* Part III.C.1.

patchwork.<sup>231</sup> While legal scholars have argued that an act of Congress should resolve this, it is this comment's assertion that such a solution, while convenient, is not necessary to achieve the goal of protecting one's persona past death.<sup>232</sup> This patchwork of current right to post-mortem publicity laws is messy, but they do have a consistency which is easily understood.<sup>233</sup> There is currently no federal standard, but achieving the goals of ensuring whether a persona should or should not digitally reappear after death is possible without one.<sup>234</sup>

Perhaps the closest federal statute to a federal right to publicity is the Lanham Act.<sup>235</sup> The Lanham Act is the primary trademark act of the United States, outlawing activities such as trademark infringement and false advertising.<sup>236</sup> Section 43(a) provides two theories of liability for recovery from false or misleading statements, which may include an unauthorized persona appearance:

- (1) false representations regarding the origin, endorsement, or association of goods or services through the wrongful use of another's distinctive mark, name, trade dress, or other device ("false endorsement" or "false association"), and
- (2) false representations in advertising concerning the quality of services or goods ("false advertising")<sup>237</sup>

To recover on a right to publicity violation under this statute, one needs to make an argument on these trademark grounds.<sup>238</sup> Section 43(a)(1) is similar to the right of publicity requirement that the defendant's use must identify the plaintiff.<sup>239</sup> While more copyrightable and marketable aspects like catchphrases and sayings may rise to meet a trademark definition, the Lanham Act is fundamentally more concerned with protecting commerce from trademark infringement, false descriptions, and trademark dilution.<sup>240</sup> In order for an actor to recover for the unauthorized use of their persona under a Lanham claim, the assertion must be that the actor's persona and image *is*

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231. Faber, *supra* note 148.

232. Author's original thought.

233. Faber, *supra* note 148.

234. Author's original thought.

235. See 15 U.S.C. §1125 (2012).

236. *Id.*

237. Estate of Barre v. Carter, 272 F. Supp. 3d 906, 940 (E.D. La. 2017).

238. Washington Speakers Bureau, Inc. v. Leading Authorities, Inc. 33 F. Supp. 2d 488, 493 (E.D. Va. 1999) ("To prevail under § 43(a) if the Lanham Act, a plaintiff must show that it has 'a valid, protectible trademark and that the defendant's use of the colorable imitation of the trademark is likely to cause confusion among consumers.'").

239. See *supra* Part III.A.

240. See 15 U.S.C. § 1125.

the trademark.<sup>241</sup> This seems a high burden to prove.<sup>242</sup>

In the meantime, California is in the best position to set the standard of what state-based post-mortem publicity rights should be.<sup>243</sup> While Tennessee has Elvis, California is home to Hollywood and the Screen Actors Guild, who have a vested interest in pursuing the legislation that controls this issue.<sup>244</sup> Indeed, many states like Texas have based their right to publicity statutes on the California standard.<sup>245</sup> As it currently exists, the current state statutes have a potential to conflict with each other, especially as the film industry diversifies away from Hollywood.<sup>246</sup> The problem arises in scenarios such as when the plaintiff or celebrity persona and the defendant live in separate states.<sup>247</sup> In California, the post-mortem right is determined under the laws of the celebrity's domicile at death.<sup>248</sup> How this law would interact with another state's right to publicity laws, or lack thereof, will require analysis outside the scope of this comment.<sup>249</sup> Film studios may find that the best way to avoid this is to meet the publicity right requirements of the state with the strictest statute as a method of mitigating risk against claims.<sup>250</sup>

A federal-based right to publicity would add consistency and ease to preparing the estate to protect a persona, but as it currently stands, this goal can be achieved with the patchwork of current laws.<sup>251</sup> Were Congress to pursue a federal standard, it would probably be done under the Commerce Clause.<sup>252</sup> As movies are released nationwide and celebrities move across the country, it can be argued this distribution and movement rises to the level of commercial activity that Congress may regulate.<sup>253</sup> An organization like the Uniform Law Commission could draft a federal right to publicity statute in order to resolve the discrepancies among the states.<sup>254</sup> While there has been much debate on what such a statute would look like and why it should exist, the goal of this comment is not to explore the need for this right, but instead explore how the persona right may be protected under the current framework.<sup>255</sup>

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241. Author's original example.

242. Author's original writing.

243. *Id.*

244. *Id.*

245. *See supra* Part III.C.1.

246. Author's original writing.

247. *Id.*

248. *Cairns v. Franklin Mint Co.*, 120 F. Supp. 2d 880, 883–86 (C.D. Cal. 2000).

249. Author's original writing.

250. *Id.*

251. *Id.*

252. *See* U.S. CONST. art. I, § 8, cl. 3; *United States v. Morrison*, 529 U.S. 598 (2000).

253. Author's original writing.

254. *Id.*

255. For more on the subject of a federal post-mortem publicity right, *see* Meaghan Fontein, Article, *Digital Resurrections Necessitate Federal Post-Mortem Publicity Rights*, 99 J. PAT. & TRADEMARK OFF. SOC'Y 481 (2017); Joseph J. Beard, Article, *Clones, Bones and Twilight Zones: Protecting the Digital Persona of the Quick, the Dead and the Imaginary*, 16 BERKELEY TECH. L.J. 1165 (2001).

## IV. PREPARING THE ESTATE FOR AVOIDING A POST-MORTEM ROLE

With this background in mind, application of the law follows.<sup>256</sup> If an actor or actress wants to prevent their likeness from being brought back to life by CGI, there are two easily available means to do so: by contract and by estate planning.<sup>257</sup>

*A. Method 1: The Contract*

For an actor to protect their likeness in the future, the easiest method is the contract.<sup>258</sup> An actor may take on a role with a studio and negotiate it into their contract that said studio is barred from using any means to digitally recreate the actor after the actor's death.<sup>259</sup> Standard contract law allows virtually anything to be negotiated and contracted for, and there is no reason why digital recreation should not fall under this as well.<sup>260</sup>

The benefit of the contract method is the potential for the bar on digital resurrection to survive the statutory protections provided by the state.<sup>261</sup> For example, an employment contract between an actress and Disney containing a non-resurrection clause created under California jurisdiction may provide a longer form of protection than the seventy years the state provides for post-mortem right to publicity.<sup>262</sup> The downside to the contract method is that the contract would only bind studios that the actor worked with while they were alive.<sup>263</sup> Other studios may reach out to the heirs of the actor, the holders of the publicity right, and try to persuade them to allow the digital resurrection if the studio had never done business with the actor before and thus was not blocked by contract.<sup>264</sup> For this reason, the contract method and the estate planning method should be used in tandem to better the actor's chances of successfully blocking resurrection.<sup>265</sup>

The Screen Actors Guild and American Federation of Television and Radio Artists (SAG-AFTRA), the leading labor union of actors, actresses, and film professionals, have publicly shown support for compensating actors for work past their death.<sup>266</sup> The standard SAG-AFTRA employment contract has a clause barring the reuse of photography or film without

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256. *See infra* Part IV.

257. *See infra* Part IV.A, B.

258. Author's original writing.

259. *Id.*

260. *See* RESTATEMENT (SECOND) OF CONTRACTS, § 1 (AM. LAW INST. (1981)).

261. Author's original writing.

262. *Id.*

263. *Id.*

264. *Id.*

265. *Id.*

266. Tapley & Debruge, *supra* note 14.

negotiation.<sup>267</sup> The clause also contains provisions for how damages should be awarded if the studio fails to negotiate with the actor, awarding three times the amount paid for the original work.<sup>268</sup> While SAG-AFTRA's contract does not cover the creation of a new performance achieved through digital means, it does lay a framework for how such a clause should be structured.<sup>269</sup>

The following is an example of a clause in an employment contract that bars the studio from attempting digital resurrection of the actor:

I. Recreation of Actor/Actress By Computer Generated Imagery, Body Doubles, or Any Other Digital or Practical Means

A. No attempts shall be made by Studio, its subsidiaries, or its parent companies to recreate the performance of Actor following the completion of the picture for which Actor is employed. Use of Computer Generated Imagery (CGI), body doubles, prosthetics, or any other digital or practical means to recreate the persona, likeness, or image of Actor is forbidden.

B. Studio is forbidden from using Actor's name, likeness, image, voice, records, and persona (sometimes referred to as the "right of publicity") following Actor's death. If Actor dies before completion of the of the picture for which Actor is employed, Studio must negotiate with Actor's estate to reach an agreement on what reasonable steps may be taken to complete the performance.

C. "Completion" is to mean the finishing and first release of the film for which Actor is employed.

D. If Studio fails to negotiate with Actor's estate following the death of Actor prior to completion of the film for which Actor is employed, Actor's estate shall be entitled to damages for the unauthorized use of Actor's right of persona.<sup>270</sup>

This example clause limits the ability of the studio to try to recreate the actor's likeness in any capacity following the completion of the job that the actor is signing up to do.<sup>271</sup> It makes a provision for if the actor were to die midway through production, like *Furious 7* and Paul Walker.<sup>272</sup> It also explicitly defines what completing the project looks like to close any legal

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267. See generally SAG-AFTRA, *supra* note 155.

268. *Id.*

269. Author's original writing.

270. *Id.*

271. *Id.*

272. *Id.*



loopholes that might arise by exploiting rereleases or reprintings of the movie to allow the studio to say the film is still in production.<sup>273</sup>

Of course, a contract can be negotiated and adapted for any situation needed, so any additional terms or protective measures needed may be incorporated based on the client's needs.<sup>274</sup>

### B. Method 2: The Will

The state statutes that grant the post-mortem right to publicity specifically outline that they are creating the right with the intention that it be freely transferable, assignable, and descendible to heirs.<sup>275</sup> As such, it is possible to account for this right and incorporate it into estate planning.<sup>276</sup>

#### 1. The Robin Williams Example

The most successful use of a will to prevent digital resurrection comes from the estate of the late comedian Robin Williams.<sup>277</sup> The Walt Disney Company hired Williams to perform voice acting for the 1992 animated film, *Aladdin*.<sup>278</sup> Robin Williams did not want his performance as the Genie used in the marketing of the film as it conflicted with his personal beliefs towards acting and advertising.<sup>279</sup> Williams wrote this stipulation into his contract, forbidding Disney from using his likeness to sell merchandise or advertise the film off his performance.<sup>280</sup> However, Disney disregarded this and used Williams' Genie character as the selling point of the movie.<sup>281</sup> This angered Williams, who refused to return for the direct-to-video *Aladdin* sequel, with a separate voice actor filling in as the Genie.<sup>282</sup>

After a new Disney CEO publicly apologized with a gift of a Picasso painting, Williams returned to Disney, but was less trusting of the studio.<sup>283</sup> Williams wrote into his will that everyone was barred from using his name, taped performances, or voice recordings for twenty-five years after his

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273. *Id.*

274. *Id.*

275. *See supra* Part III.C.1.

276. Author's original writing.

277. Lindsay Putnam, *Robin Williams' will prevents use of outtakes for 'Aladdin' sequel*, NEW YORK POST (Nov. 8, 2015), [https://nypost.com/2015/11/08/robin-williams-will-prevents-use-of-outtakes-for-aladdin-sequel/?utm\\_source=reddit.com](https://nypost.com/2015/11/08/robin-williams-will-prevents-use-of-outtakes-for-aladdin-sequel/?utm_source=reddit.com) [perma.cc/M9LH-7F3K].

278. Mike Reyes, *Robin Williams' Will Has a Special Clause About Future Aladdin Sequels*, CINEMA BLEND (Nov. 8, 2015), <https://www.cinemablend.com/new/Robin-Williams-Has-Special-Clause-About-Future-Aladdin-Sequels-93167.html> [perma.cc/7P6N-Q67V].

279. *Id.*

280. *Id.*

281. *Id.*

282. *Id.*

283. *Id.*

death.<sup>284</sup> This is because of the potential for gathering financial penalties for his family through posthumous earnings, but it also achieved his personal goal—Williams has not been brought back in any way in any project since his death in 2014.<sup>285</sup> The 2019 *Aladdin* live-action remake featured no trace whatsoever of Robin Williams, with Will Smith helming the Genie role.<sup>286</sup> Even material outside the movie like marketing and toys were devoid of his likeness, leading to the conclusion that his efforts were successful.<sup>287</sup>

In response to the November 2019 announcement of James Dean’s persona being reused for *Finding Jack*, Zelda Williams, Robin Williams’ daughter, joined in on the Twitter outrage against the movie.<sup>288</sup> When asked if a company owns your likeness after death, Williams responded “No, but they can ‘buy it’ from your family or estate. We had it secured for Dad, that no one would be ‘resurrecting’ him for a bad facsimile.”<sup>289</sup> Zelda Williams also argued that the ethics of digital resurrection are morally repugnant, saying “It’s bad taste & a bad call,” and that “Even a CLOSE relative has no real idea and should arguably have no right to decide what acting choices you’d want to make, what movies you’d want to do. This implies that once you die, you do whatever anyone else wants, as long as they buy your participation.”<sup>290</sup>

Zelda Williams also called attention to the problem of how this scenario treats the deceased with no plan in their wills for digital resurrection, such as actors like James Dean who died before this technology was remotely possible.<sup>291</sup>

I could [sic] care less if currently living actors aware of the tech decide to sign away their likeness after death. Go ahead! But people who died before this tech was even a theory are another matter. They were people. Pretending they belong to whoever pays for them now is abhorrent.<sup>292</sup>

Williams continued: “My family can’t force me to do something for money while I’m alive. Why should that change after death?”<sup>293</sup>

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284. *Id.*

285. *Id.*

286. ALADDIN (Walt Disney Pictures 2019).

287. *Id.*

288. *See supra* Part III.C.1.

289. Zelda Williams, TWITTER (Nov. 6, 2019, 3:45 PM), <https://twitter.com/zeldawilliams/status/1192226409894170624> [perma.cc/8LJH-6EB2].

290. Zelda Williams, TWITTER (Nov. 6, 2019, 4:06 PM), <https://twitter.com/zeldawilliams/status/1192231727843799042>; Zelda Williams, TWITTER (Nov. 6, 2019, 3:45 PM), <https://twitter.com/zeldawilliams/status/1192226409894170624> [perma.cc/CJ4C-SV4B].

291. *See Reyes supra* note 278.

292. Zelda Williams, TWITTER (Nov. 8, 2019, 3:34 PM), <https://twitter.com/zeldawilliams/status/119294855800932352> [perma.cc/45H6-A4BZ].

293. Zelda Williams, TWITTER (Nov. 8, 2019, 3:28 PM), <https://twitter.com/zeldawilliams/status/1192946997487001600> [perma.cc/X7LL-D9TW].

Zelda Williams concluded by saying “it’s gonna [sic] become common immediately to add a likeness reproduction clause to wills. Those who historically didn’t get the chance to protect theirs, should be protected as if they did. That INCLUDES from their own, likely now distantly related estates.”<sup>294</sup> This comment seeks to define what those wills which Zelda Williams calls for should look like.<sup>295</sup>

## 2. *The Model Likeness Protection Strategy*

In order to prevent their likeness from being exploited after their death, an actor may contact an attorney to draft a clause in their will that reflects this wish.<sup>296</sup> The novelty of the problem provides very few references to turn to, but because of his apparent success, Robin Williams’ strategy to protect his likeness is the best example to follow.<sup>297</sup>

First, Robin Williams created a trust in his name to distribute his property following his death.<sup>298</sup> Williams was the initial trustee, with ownership of the trust succeeding to his business manager after death.<sup>299</sup> The trust then specifies that the trustee shall distribute property in the following manner:

All ownership interest in the right to Settlor’s [Williams] name, voice, signature, photograph, likeness, and right of privacy/publicity (sometimes referred to as “right of publicity”) to the Windfall Foundation, a California Nonprofit Corporation (“THE WINDFALL FOUNDATION”), subject to the restriction that such right of publicity shall not be exploited for a twenty-five (25) year period commencing on the date of the Settlor’s death.<sup>300</sup>

Robin Williams instructed the trust transfer his post-mortem publicity rights to a corporation called the Windfall Foundation.<sup>301</sup> By transferring this right to a corporation with the instructions that the right may not be used for twenty-five years, Williams avoids any rule against perpetuities issues that may arise by keeping the right in a trust.<sup>302</sup>

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294. Zelda Williams, TWITTER (Nov. 8, 2019, 3:51 PM), <https://twitter.com/zeldawilliams/status/1192952743423397888> [perma.cc/HG9R-FAY5].

295. Author’s original writing.

296. *Id.*

297. *Id.*

298. *See infra* Appendix B.

299. *See infra* Appendix B.

300. *See infra* Appendix B.

301. *See infra* Appendix B.

302. *See infra* Appendix B.

A client may protect their post-mortem publicity right by stashing it in a corporation with instructions that the executives may not use the right.<sup>303</sup> This achieves the goal of preventing film studios from using the client's likeness in a future movie.<sup>304</sup> Even if the client's heirs and descendants wanted to exploit the client's persona rights, the rights would be safely out of reach.<sup>305</sup> If these rights were used without permission, the executives of the corporation would have the standing to sue the individual or entity infringing on the rights.<sup>306</sup> The executives of the corporation could be family members, but as a safeguard, the executives should include a neutral third party not related to the client that may bring suit against the family if they try to wrongfully use it.<sup>307</sup> Because of the instructions given when the right is transferred to the corporation, the executives have a duty to protect the right from infringing use by others.<sup>308</sup>

Therefore, to prevent a client's persona from being used after death, three requirements must be met: (1) the client must be subject to the laws of a state that recognizes post-mortem right to publicity, (2) the client must create a corporation that they can transfer the right to, and (3) the client must write in their trust or will a granting clause with instructions that gives the corporation the post-mortem right to publicity.<sup>309</sup>

Presumably, the type of person (actors, celebrities) that would have the ability to protect their image live in a state where such protections are in place.<sup>310</sup> Since generally most Hollywood actors live in California, this element should not be an issue.<sup>311</sup> However, if the client does not live in California, the client should establish domicile in a state that recognizes post-mortem right of publicity in order to be subject to it to protect their interests.<sup>312</sup> Oklahoma and Arkansas are two states with low cost of living that recognize post-mortem right to publicity that may be an option for a celebrity not living in one of the twenty-two states that recognize the right.<sup>313</sup>

To grant the right of publicity to the corporation, the language of the trust or will should be clear and unequivocal.<sup>314</sup> The following is a sample granting clause that may be modified in order to accomplish the client's goals:

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303. Author's original writing.

304. *Id.*

305. *Id.*

306. *Id.*

307. *Id.*

308. *Id.*

309. *Id.*

310. *Id.*

311. *Id.*

312. Faber, *supra* note 148.

313. Scott Cohn, *America's 10 Cheapest States to Live In*, CNBC (July 10, 2018), <https://www.cnbc.com/2018/06/28/americas-cheapest-states-to-live-in-2018.html> [perma.cc/44D8-DAJS].

314. Author's original writing.

### Client's Right to Publicity – Granting Clause

The Client shall distribute the following tangible personal property:

(a) All ownership in the right to Client's name, image, voice, signature, photograph, likeness, and right of privacy/publicity (sometimes referred to as the "right of publicity") to the \_\_\_\_\_ Corporation, subject to the restriction that such right of publicity shall not be exploited for a period of 50 years commencing on the date of Client's death.<sup>315</sup>

This granting clause will require modification to meet the desires of the client and how long they wish to protect their persona, either for a period of years or for the maximum allowed by the state statute.<sup>316</sup> The right can only be protected for as long as the state statute specifies; for example, in Texas the limit is fifty years.<sup>317</sup>

After the time laid out in the statute has run, is your persona public domain?<sup>318</sup> That starts to conflate intellectual property and the property right to your persona, but it works by analogy.<sup>319</sup> The easiest comparison is to look at a historical figure like Napoleon Bonaparte.<sup>320</sup> If Hollywood released a Napoleon movie tomorrow, his distant heirs would not expect to receive any sort of royalties.<sup>321</sup> Napoleon has entered the public consciousness as a public figure that everyone has a right to use, parody, or incorporate into another work.<sup>322</sup> As such, Napoleon's persona has entered the public domain in the sense that while a person is not copyrightable, their portrayal after a time becomes available for all to use.<sup>323</sup> Alternatively, it is arguable that the persona of Napoleon or anyone dead beyond the protection period has become a public figure, as one's status as a public figure or official is a defense to a right of publicity claim.<sup>324</sup> Regardless, once the state statute's protection period runs out, there is no way for the rights holder to recover.<sup>325</sup>

Can you destroy your right to publicity in your will?<sup>326</sup> Once the state has granted you that right, can you destroy it so that no one can use it?<sup>327</sup> In the California statute, the only way to terminate the right is if the personality dies intestate and no heir can be found.<sup>328</sup> However, it is possible that you

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315. Author's original writing.

316. *Id.*

317. TEX. PROP. CODE ANN. § 26.002

318. Author is raising this question.

319. Author's original writing.

320. Author is creating this example.

321. *Id.*

322. *Id.*

323. Author is creating this definition.

324. *White*, 971 F.2d at 1396.

325. *See supra* Part III.C.2.

326. Author is raising this question.

327. *Id.*

328. CAL. CIV. CODE § 3344(a).

could stipulate in your will that the right is transferable only to a beneficiary on the conditions that they do not use it.<sup>329</sup> Again, this only lasts for as long as the statutory protections allow.<sup>330</sup>

### 3. The “Ancient Dead” and How to Protect Their Image

Zelda Williams’ tweets call for a very specific protection—a way to protect actors who had no foresight to put an anti-resurrection clause into their will.<sup>331</sup> Deceased actors from the pre-digital age of filmmaking had no perspective or possible clue that today’s level of technology could potentially resurrect them, and as such have nothing within their wills instructing their estates on how to handle the matter.<sup>332</sup> These “ancient dead” actors, personalities like James Dean, Peter Cushing, Malcolm X, Christopher Reeve, and more, are potentially susceptible to resurrection by Hollywood.<sup>333</sup> In other words, virtually every actor or actress dead prior to, generously speaking, 1995 almost certainly do not have any plan for how their estate should handle digital resurrection.<sup>334</sup> This is a very generous assumption dependent on the possibility that prophetic others like Robin Williams saw the potential in the rapid growth of CGI technology of the 1990s as a means to digitally replace themselves.<sup>335</sup> The number of actors this affects extends into the modern day as well, as mainstream stories such as the James Dean resurrection, only recently bring this concern to the forefront.<sup>336</sup> Additionally, this includes actors who died intestate.<sup>337</sup>

Based on the state laws for post-mortem right to publicity, the right is descendible and assignable.<sup>338</sup> In states like California and Texas, the right is granted and protected for seventy and fifty years, respectively.<sup>339</sup> Even actors who are dead prior to the enactment of the state statute are retroactively given the property right.<sup>340</sup> However, once the property right is created, the estate may not retroactively prosecute past infringements, only future ones.<sup>341</sup> In Texas, anyone alive on or after September 1, 1987 or who died on or after January 1, 1937 who had a commercial value in their persona has the right of post-mortem publicity.<sup>342</sup> California is broader still, with any personality

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329. Author’s original writing.

330. *See supra* Part III.C.1.

331. *See supra* Part IV.B.2.

332. Author’s original writing.

333. *Id.*

334. *Id.*

335. *Id.*

336. *Id.*

337. *Id.*

338. *See supra* Part III.C.1.

339. *See supra* Part III.C.1.

340. *See supra* Part III.C.1.

341. *See supra* Part III.C.1.

342. TEXAS PROP. CODE. ANN. § 26.003.

dead prior to January 1, 1985 retroactively granted the post-mortem publicity rights.<sup>343</sup>

Looking at the example of James Dean, the twenty-four-year-old actor died on September 30, 1955 in California, the state that he resided in.<sup>344</sup> The California statute granted his estate a property right in his post-mortem publicity rights for seventy years, meaning that until 2025, Dean's estate is the only entity allowed to profit off of his image and persona.<sup>345</sup> If someone else tried to profit off of Dean's persona before 2025, Dean's estate would be able to sue for damages.<sup>346</sup> So why is James Dean's image going to appear in the 2020 film *Finding Jack*?<sup>347</sup>

The simple answer is that Dean's estate gave permission to do so, presumably for a large sum of money.<sup>348</sup> Magic City Films must have purchased or contracted the right to use Dean's image from his estate in order to avoid liability.<sup>349</sup> The studio's announcement of the CGI casting decision seems to support this theory:

We feel very honored that his family supports us and will take every precaution to ensure that his legacy as one of the most epic film stars to date is kept firmly intact. The family views this as his fourth movie, a movie he never got to make. We do not intend to let his fans down.<sup>350</sup>

The easiest explanation is that the rights holders of James Dean's persona, his estate, must have given permission to the studio to digitally resurrect him.<sup>351</sup>

Because of this, there is no one else who could recover for this resurrection.<sup>352</sup> The estate in charge of protecting James Dean's image willingly licensed it out.<sup>353</sup> Zelda Williams raises an important point—who can protect the legacy and wishes of these ancient dead actors?<sup>354</sup> The answer is their estates, and those estates are perfectly within their legal right to do whatever they would like with the persona right entrusted to them.<sup>355</sup> Of course, even this is a legal fiction, as the actor could not have *entrusted* the

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343. CAL. CIV. CODE § 3344.1.

344. *James Dean: Biography*, IMDb, [https://www.imdb.com/name/nm0000015/?ref\\_=nv\\_sr\\_1?ref\\_=nv\\_sr\\_1](https://www.imdb.com/name/nm0000015/?ref_=nv_sr_1?ref_=nv_sr_1) [perma.cc/TK5S-WBV5] (last visited Nov. 15, 2019).

345. *See supra* Part III.C.1.

346. *Id.*

347. Author's original writing.

348. *Id.*

349. Ritman, *supra* note 3.

350. *Id.*

351. Author's original conclusion.

352. *Id.*

353. *Id.*

354. *See Reyes, supra* note 278.

355. Author's original conclusion.

right to his estate when he could never have envisioned the possibility.<sup>356</sup> This is a dark outcome, as Zelda Williams said, and leads the potential of taking advantage of the dead for their brand recognition alone.<sup>357</sup> With enough money, a studio could convince any rights holder that their loved one could digitally return for one more movie, and save any sort of moral quandaries from the rights holders, there would be nothing anyone could do to stop it.<sup>358</sup>

It does not seem likely that legislation could fix this problem.<sup>359</sup> After all, the post-mortem right to publicity statutes are there in order to give estates the protection against studios appropriating an actor's likeness.<sup>360</sup> If the estate chooses to contract that right to the studio anyway, that is the estate's decision.<sup>361</sup> While many decry the morality of this, the simple fact is that the rights holders are free to do what they want with their decedent's likeness.<sup>362</sup> The ancient dead, the actors deceased from 1950 to the late 1990's without any clause in their will regarding resurrecting their persona, are fair game to any studio with a budget high enough to persuade the actor's heirs.<sup>363</sup> In time, the problem should hopefully resolve itself, as going forward there is a much greater likelihood that actors and actresses will contain provisions in their will that take into account the right of persona.<sup>364</sup>

If James Deans' family decided at some point before the *Finding Jack* deal that they did not want to allow his persona to be used, the administrator of his estate could have theoretically placed it in a corporation with instructions to never use it.<sup>365</sup> For ancient dead actors, there is still time for their heirs to act to protect the post-mortem publicity rights before big studios come calling with large enough sums of money to change their minds.<sup>366</sup>

## V. PREPARING THE ESTATE FOR ENSURING A POST-MORTEM ROLE

What if a client wanted to achieve the opposite goal?<sup>367</sup> What if the client wanted to ensure that they appear in a movie after their death?<sup>368</sup> The client would need to take steps to ensure that this happens, as well as set

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356. *Id.*

357. Zelda Williams, TWITTER (Nov. 6, 2019, 10:07 AM), <https://twitter.com/zeldawilliams/status/1192141551171854338> [perma.cc/MH2C-JATF].

358. Author's original conclusion.

359. *Id.*

360. *See supra* Part III.C.1.

361. Author's original writing.

362. *Id.*

363. *Id.*

364. *Id.*

365. *Id.*

366. *Id.*

367. *See infra* Part V.

368. *See infra* Part V.



requirements for what such an appearance would look like.<sup>369</sup>

#### A. Method 1: The Contract

Since the post-mortem right to publicity is a freely assignable and transferable right, standard property and contract law is applicable.<sup>370</sup> As such, there are a vast number of standard legal options that the client has in order to ensure the right is used.<sup>371</sup>

The contract allows an actor to sign over their persona to a studio for future use while the actor is still alive.<sup>372</sup> An elderly actor could even contract for a studio to recreate him or her from a younger point in their life and then stay involved in an advisory role.<sup>373</sup> This is already happening today, with movies like *Gemini Man*, *Captain Marvel*, and *The Irishman* using digital de-aging technology to make older actors look the way they did in their youth.<sup>374</sup>

Some potential concerns that the client might have when negotiating the contract include when the studio may use the right, whether they have the exclusive right to use the persona, how many movies the studio may use the digital recreation in, and whether the client's heirs have any input on the future film.<sup>375</sup> A major limiting factor to contracting the right to a studio is the statutory protection period.<sup>376</sup> For example, a Hollywood-based studio in California would only have the contracted right for seventy years before it enters the public domain for the rest of the world to use.<sup>377</sup>

In summary, the adage “you can contract to anything” applies to contracting out the publicity right after death.<sup>378</sup> There are no special steps that are required or must be taken for this method to be successful, leaving an actor able to contract the right in any way they see fit.<sup>379</sup>

#### B. Method 2: The Will

Similarly, the will method is just as broad of an option.<sup>380</sup> Within their will or trust, an actor may choose who inherits their publicity right.<sup>381</sup> This

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369. See *infra* Part V.

370. See *supra* Part III.C.1.

371. See *infra* Part V.

372. Author's original writing.

373. *Id.*

374. See *CAPTAIN MARVEL* (Marvel Studios 2019); *GEMINI MAN* (Paramount Pictures 2019); *THE IRISHMAN* (Netflix 2019); Pallotta, *supra* note 51.

375. Author's original writing.

376. See *supra* Part III.C.1.

377. CAL. CIV. CODE § 3344.1.

378. Author's original writing.

379. *Id.*

380. *Id.*

381. See *supra* Part III.C.1.

could include a studio that the actor wants the right to reside with and be used by.<sup>382</sup> Alternatively, an actor could transfer the right to his heirs with specific instructions on how the right should be used, similar to the model likeness protection strategy.<sup>383</sup> These instructions may include how the actor wants their lasting image to be used and outline what kinds of productions the actor would want their persona appearing in.<sup>384</sup> For example, the actor might instruct that their likeness is not allowed to appear in science fiction movies, in any project under a certain budget, or in any project by a named studio.<sup>385</sup>

The actor may also choose to specify how the rights holders may distribute the rights, such as whether the heirs are required to keep the persona right and lease it to studios, or whether they may transfer the rights fully to another entity.<sup>386</sup> Other concerns may include how payment and royalties are distributed, whether the studio must recreate the persona within a set description, and whether the studio may use any existing proactive recreation steps taken while the actor was still alive.<sup>387</sup>

Like the contract method, there is virtually no limit to planning the estate to achieve this goal.<sup>388</sup> By using a corporation with set instructions, like in the model likeness protection strategy, the actor could theoretically forever control how they will continue appearing in movies past their death.<sup>389</sup>

### C. Dying Intestate

If the actor dies intestate, then in the jurisdictions granting post-mortem right to publicity the right belongs to the actor's heirs, typically family members.<sup>390</sup> In most states, if no heir can be located by the rules of intestacy, the right to publicity is terminated.<sup>391</sup> With no plan in place, the rights holders are free to make their own judgments as to what projects their loved one should be cast in.<sup>392</sup> This may result in the danger that Zelda Williams warned against—distant relatives using their long-dead family member to profit from their likeness.<sup>393</sup>

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382. Author's original writing.

383. *See supra* Part IV.B.2.

384. Author's original writing.

385. *Id.*

386. *Id.*

387. *Id.*

388. *Id.*

389. *Id.*

390. *See* CAL. CIV. CODE § 3344.1; TENN. CODE ANN. § 47-25-1101; TEX. PROP. CODE ANN. § 26.002.

391. Author's original writing.

392. *Id.*

393. *See supra* Part IV.B.3.

## VI. CONCLUSION

As digital recreation technology becomes increasingly advanced, more and more actors and actresses will search for methods to protect their personas.<sup>394</sup> While some will take steps to ensure proactive recreation, such as creating full 3D scans of their bodies, others will plan their estates in a way to prevent retroactive recreation.<sup>395</sup>

The right to publicity is a privacy tort that allows a plaintiff to recover for an unauthorized use of their likeness by the defendant.<sup>396</sup> The right to publicity protects the plaintiff's value in their identity, performance, or image.<sup>397</sup> Not every state recognizes this cause of action, and there is no federal standard, with states having recognized the right either by statute or common law.<sup>398</sup>

The right to publicity at common law ends at death, but in many states the right is now an inheritable and descendible property right.<sup>399</sup> The post-mortem right to publicity is a right granted by the state and allows a public figure's heirs to continue protecting and profiting from the decedent's image for a period of years after death.<sup>400</sup> In California, this period is seventy years; in Texas, this period is fifty years.<sup>401</sup> During this period of time, the rights holder is the only one that may use the decedent's right of publicity.<sup>402</sup> After the period of years expires, the publicity right enters the public domain in that the persona is now available for anyone to use without licensing the right from the decedent's heirs.<sup>403</sup>

If an actor or actress wanted to protect their right to publicity from use after their death, there are a few options that are available to them.<sup>404</sup> The first method arises when an actor is negotiating a new contract with a studio.<sup>405</sup> The actor should include a clause that forbids the studio from recreating the actor's likeness at any point in the future.<sup>406</sup> This may include an exception for if the actor dies midway through production and digital recreation is needed in order to finish the movie.<sup>407</sup> The contract method is useful in that it can potentially protect a persona from reappearing for a period of years longer than the state may provide, but is limited in that the contract only binds

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394. *See supra* Part I.

395. *See supra* Part II.

396. *See supra* Part III.A.

397. *See supra* Part III.A.

398. *See supra* Part III.C.1.

399. *See supra* Part III.C.

400. *See supra* Part III.C.

401. *See supra* Part III.C.

402. *See supra* Part III.C.

403. *See supra* Part III.C.

404. *See supra* Part IV.

405. *See supra* Part IV.A.

406. *See supra* Part IV.A.

407. *See supra* Part IV.A.

those studios that the actor or actress works with while alive.<sup>408</sup>

The second method available for protection is to follow the estate planning strategy adopted by Robin Williams.<sup>409</sup> In order to safeguard their post-mortem right to publicity, the actor or actress must: (1) own property in a state that recognizes post-mortem right to publicity, (2) create a corporation that the right can be transferred to, and (3) include a granting clause in their will or trust that gives the corporation the post-mortem right to publicity, including instructions on how the right may or may not be used.<sup>410</sup> By this method, the right will only be protected for as long as the state grants exclusive protection.<sup>411</sup>

For the ancient dead, those actors and actresses dead before the turn of the century, their post-mortem publicity rights are unprotected from any studio that has the money to convince the heirs to give the studio the right to digitally resurrect the decedent.<sup>412</sup> This is why the *Finding Jack* movie is able to cast James Dean decades after his death—his post-mortem publicity right was given by his estate to the studio trying to bring him back.<sup>413</sup> For other ancient dead actors, their heirs still have the opportunity to protect the actor's image for the remaining statutory period of years by placing the right in a corporation where it cannot be used.<sup>414</sup>

The opposite is also possible—if an actor or actress wanted to ensure their persona's appearance in a future film past their death, the options are much wider.<sup>415</sup> The actor may choose to contract the persona right to a studio at any point, receiving a profit in the short term while the studio invests in potentially using the actor's likeness in the future.<sup>416</sup> The actor would also want to engage in proactive recreation, taking full 3D body scans, recording reference materials, and more, in order to make the outcome more likely.<sup>417</sup> The actor may also leave instructions in their will or trust instruction how the right should be used.<sup>418</sup> For example, a classically trained thespian may include instructions saying that his persona shall not be used in low-brow comedy films.<sup>419</sup> The post-mortem right to publicity is fully assignable and transferable, leaving an actor or actress who wishes to attain digital immortality a plethora of options on how they may pursue their goal.<sup>420</sup>

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408. See *supra* Part IV.A.

409. See *supra* Part IV.B.1.

410. See *supra* Part IV.B.2.

411. See *supra* Part IV.B.2.

412. See *supra* Part IV.B.3.

413. See *supra* Part IV.B.3.

414. See *supra* Part IV.B.3.

415. See *supra* Part V.

416. See *supra* Part V.A.

417. See *supra* Part V.A.

418. See *supra* Part V.B.

419. See *supra* Part V.B.

420. See *supra* Part V.

The *Finding Jack* announcement brought the issue of post-mortem right to publicity into the public consciousness.<sup>421</sup> The announcement highlights the need for actors and actresses to address the issue in their estate planning.<sup>422</sup> Using the model likeness protection strategy serves as an effective means to prevent the dark future that Zelda Williams warned about, ensuring that the actor's likeness is protected from exploitation beyond death.<sup>423</sup>

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421. *See supra* Part I.

422. Author's original writing.

423. *Id.*

APPENDIX A

COPIES OF THIS GRANT ARE NOT VALID UNLESS  
THEY BEAR THE IMPRESSED SEAL OF THE COURT

**IN THE HIGH COURT OF JUSTICE  
The District Probate Registry at Brighton**

BE IT KNOWN that **PETER WILTON CUSHING**  
otherwise **PETER CUSHING**

of **3 Seaway Cottages West Beach Whitstable Kent**

died on the **11th** day of **August 1994**  
domiciled in **England and Wales**

AND BE IT FURTHER KNOWN that the last Will and Testament of the said deceased (a copy of which is annexed) was proved and registered in the High Court of Justice and Administration of all the estate which by law devolves to and vests in the personal representative of the said deceased was granted by the said Court on this date  
to the Executors

**JOYCE MARGARET BROUGHTON** of **The Barn Brogdale Oast  
Brogdale Road Faversham Kent ME13 8XY**

and **BERNARD BRIAN BROUGHTON** of **The Barn Brogdale Oast  
Brogdale Road Faversham Kent ME13 8XY**

It is hereby certified that it appears from information supplied on the application for this grant that the gross value of the said estate in the United Kingdom amounts to £ 282,163 and the net value of such estate amounts to £ 276,102

Dated the **20th** day of **December 1994**

  
DISTRICT REGISTRAR/PROBATE OFFICER

Extracted by **T G BAYNES & SONS (Ref: AR) 208 Broadway Bexleyheath Kent DA6 7BG**

**PROBATE**

0 *J.M. Broughton* *M. Buller*  
 Executor                      Trustee                      Solicitor  
 THIS IS THE LAST WILL of me PETER WILTON CUSHING of 3 Seaway  
 Cottages West Beach Whitstable in the County of Kent CT5 1EQ  
 Actor

1. I HEREBY REVOKE all former Wills and Codicils and  
 Testamentary Dispositions heretofore made by me

2. I APPOINT JOYCE MARGARET BROUGHTON and BERNARD BRIAN  
 BROUGHTON of The Barn Brogdale East Brogdale Road Faversham  
 Kent ME13 8XY (hereinafter called my Trustees) to be the  
 Executors and Trustees of this my Will

3. I MAKE the following specific bequests free of all duties  
 and in particular I DIRECT that any Inheritance Tax payable on my  
 death in respect of any of the following bequests shall be paid  
 out of my death residuary estate:-

(a) My freehold house 3 Seaway Cottages and all contents of 3  
 Seaway Cottages aforesaid not hereby nor by any Codicil hereto  
 otherwise bequeathed together with the garden and barn at the  
 rear of this property on land purchased by me in 1962 from Mr  
 Airey to the said JOYCE MARGARET BROUGHTON and her said Husband  
 BERNARD BRIAN BROUGHTON or to the survivor of them but if they  
 should both predecease me then to MRS ANGELA HELENE BECK HURWITZ  
 (nee BECK) of 421 Cleveland Avenue Santa Cruz California 95060  
 U.S.A.

(b) To PETER GRAY of Orchard Hey Broomhill Chagford  
 Devonshire TQ13 8DD all my books except those otherwise  
 hereinafter specifically bequeathed or chosen by the said MR &  
 MRS BERNARD BRIAN BROUGHTON

(c) To SIMON ANTHONY ASHTON PRITCHARD the right to choose one of  
 the paintings done by me and any one of the Edward Seago  
 paintings other than those specifically bequeathed also any or  
 all of our games which he may like to share with MR & MRS  
 CHRISTOPHER POWNEY

(d) To DAVID CLAUGHTON of Whitehorne 37 Virginia Road  
 Whitstable Kent the model tithe barn which I made if he would  
 like it

(e) To the said MR & MRS BERNARD BRIAN BROUGHTON or the survivor  
 of them any number of paintings done by me of their choice also  
 the two Sir William Russell Flint Sanguine drawings also the  
 following Edward Seago paintings Dahlias and Zinnias Tobacco  
 Flowers Outside St Peter's Rome The Square Chioggia Winter  
 Morning Greenwich and the remainder of my Seago paintings not  
 bequeathed elsewhere also any books of their choice other than  
 those specifically bequeathed and one of my watercolours to ALAN  
 BARRY SACKS

(f) To the said JOYCE MARGARET BROUGHTON and her said Husband  
 BERNARD BRIAN BROUGHTON my stamp collection and cigarette card  
 collection to share between them

(g) All my books appertaining to the theatre to GUY SLATER of 26  
 Orleans Road Twickenham Middlesex TW1 3BL but if for any  
 reason he does not want them then I would like them left to the

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said JOYCE MARGARET BROUGHTON and her said Husband BERNARD BRIAN BROUGHTON

4. I BEQUEATH the following pecuniary legacies free of all duties:-

(1) To the said MRS ANGELA HELENE BECK HURWITZ (nee BECK) the sum of FIFTEEN THOUSAND POUNDS (£15,000)

(2) To MRS SUE FITCHIE (nee LUDLOW) care of The Tudor Tea Rooms 29 Harbour Street Whitstable Kent CT5 1AH the sum of TEN THOUSAND POUNDS (£10,000)

(3) (a) To the said DAVID CLAUGHTON the sum of TWENTY-FIVE THOUSAND POUNDS (£25,000)

(b) To MRS MARGARET SMITH of 23 Wallerton Gardens East Sheen London SW14 the sum of FIVE THOUSAND POUNDS (£5,000)

(4) To the said JOYCE MARGARET BROUGHTON a sum equal to the value of any car that she may have the use of at the time of my death from me or any company with which I may have been associated

5. I DEVISE AND BEQUEATH all the remainder of my estate real and personal wheresoever and whatsoever unto my Trustees Upon Trust to sell call in and convert the same into money with power to postpone the sale calling in and conversion thereof so long as they shall in their absolute discretion think fit without being liable for loss

6. MY TRUSTEES shall hold the net proceeds of the said sale calling in and conversion together with my ready money upon the following trusts:-

(a) Subject hereto Upon Trust to pay thereout all my just debts funeral and testamentary expenses

(b) Subject hereto Upon Trust for the said JOYCE MARGARET BROUGHTON and her said Husband BERNARD BRIAN BROUGHTON in equal shares absolutely

(c) I declare that if either MR or MRS BERNARD BRIAN BROUGHTON shall predecease me then the share of my residuary estate which such deceased person would have taken had he or she survived me shall devolve to the survivor

(d) I declare that if both MR & MRS BERNARD BRIAN BROUGHTON predecease me then my Trustees shall hold my residuary estate Upon Trust equally between:-

(1) The said MRS ANGELA HELENE BECK HURWITZ

(11) EVELYN NORRIS HOUSE FOR AGED MEMBERS OF EVERY MEDIA OF THE PROFESSION OF ENTERTAINMENT 38/40 Navarino Road Worthing Sussex BN11 2NF

(111) THE LEUKAEMIA RESEARCH FUND 43 Great Ormond Street London WC1N 3JJ



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7. IT IS MY DESIRE that my body be cremated and my ashes buried with the ashes of my beloved Wife and I request that there should be no flowers or mourning and that any person wishing should send a donation to a Spastic Society and that my funeral expenses be kept to an absolute minimum

8. IF my eyes can be used to help the blind or if my body or any part of it could be used to benefit surgery or my fellowman I would wish such use to be made

IN WITNESS whereof I have hereunto set my hand this EIGHTH day of JULY One thousand nine hundred and ninety-four

SIGNED by the above named )  
testator PETER WILTON CUSHING as )  
and for his last Will in the )  
presence of us both present at )  
the same time who at his request )  
in his presence and in the )  
presence of each other have )  
hereunto subscribed our names as )  
Witnesses:-

*Albert David Wilton*

6. Columbia Ave  
Whitehall  
Kent CT 5-486

Retired

*P. J. Han*

6 Columbia Ave  
Whitehall  
Kent CT 5-486

Retired

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APPENDIX B

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10 Attorneys for Beneficiary  
SUSAN SCHNEIDER WILLIAMS

11  
12 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
13 **COUNTY OF SAN FRANCISCO**  
14

15 In the Matter of the  
16 THE ROBIN WILLIAMS TRUST

Case No. 14-298367

**AMENDED EXHIBIT A TO PETITION  
FOR INSTRUCTIONS**


DATE: March 30, 2015  
TIME: 9:00 a.m.  
DEPT: 204 (Probate)

ELECTRONICALLY  
**FILED**  
*Superior Court of California,  
County of San Francisco*  
**MAR 25 2015**  
Clerk of the Court  
BY: ELIZABETH FONG  
Deputy Clerk

1 Pursuant to this Court's Probate Examiner's Notes dated March 24, 2015, Counsel for  
 2 Petitioner hereby files an unredacted copy Exhibit A to the Petition for Instructions originally  
 3 filed on December 19, 2014. Exhibit A is the Second Amendment to and Complete Restatement  
 4 of Trust Agreement of the Robin Williams Trust.

5  
 6 Dated: March 24, 2015

**KERR & WAGSTAFFE LLP**

7  
 8 By:   
 9 JAMES M. WAGSTAFFE

10 Attorneys for Beneficiary  
 11 SUSAN SCHNEIDER WILLIAMS

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# **EXHIBIT A**

**SECOND AMENDMENT TO AND  
COMPLETE RESTATEMENT OF TRUST AGREEMENT OF  
THE ROBIN WILLIAMS TRUST**

This SECOND AMENDMENT TO AND COMPLETE RESTATEMENT (“Restatement”) of the Trust Agreement dated June 24, 2010 (“Trust Agreement”) (establishing the ROBIN WILLIAMS TRUST (“Trust”)) is made as of the date set forth below by ROBIN M. WILLIAMS as Settlor and as Trustee.

WITNESSETH:

WHEREAS, Settlor pursuant to his reserved right to amend wishes to substantially amend and fully restate the Trust Agreement and the Trust established therein (which had been previously amended by the First Amendment thereto dated December 27, 2010) and the Trustee wishes to and hereby does accept and consent to such amendment and restatement.

NOW, THEREFORE, the Settlor hereby completely amends and fully restates the Trust Agreement and the Trust as follows:

“ARTICLE 1

DEFINITION OF PROPERTY IN TRUST ESTATE;

ACKNOWLEDGMENT OF PRENUPTIAL AGREEMENT

All property subject to this trust and any trust established pursuant hereto at any time (herein sometimes referred to as the “trust estate”) shall be held, administered, and distributed as provided below. All such property is and shall continue to be Settlor’s separate property. The Trustee acknowledges Settlor’s Prenuptial Agreement dated September 28, 2011 with SUSAN M. SCHNEIDER (herein sometimes referred to as “SUSAN” or “Settlor’s spouse”) and agrees to fulfill Settlor’s financial obligations thereunder in the event of Settlor’s incapacity or death. Such obligations (including SUSAN’s Trust established in Article 4 hereof) are in the nature of a claim against Settlor’s estate for federal estate tax purposes.

ARTICLE 2

PROVISIONS RELATING TO TRUSTEE SUCCESSION

2.1 Initial Trustee. ROBIN M. WILLIAMS is and shall continue to be the initial Trustee.

2.2 Trustee Succession. Upon the death, resignation or incapacity (as determined in Paragraph 3.5 of Article 3, below) of the Settlor, his term as Trustee shall cease and terminate and Settlor's business manager, JOEL FADEN, and personal manager, STEPHEN TENENBAUM, shall jointly and collectively serve as Trustee in his place. If for any reason JOEL FADEN shall be unable or unwilling to serve or continue to serve as a co-Trustee, CYNTHIA S. MARGOLIS shall serve as successor co-Trustee in his place; and if for any reason STEPHEN TENENBAUM shall be unable or unwilling to serve or continue to serve as a co-Trustee, ARNOLD D. KASSOY shall serve as successor co-Trustee in his place. The last to serve as a co-Trustee of STEPHEN TENENBAUM and ARNOLD D. KASSOY shall designate by written instrument as his successor any individual or Qualified Trustee (as defined in Paragraph 2.4, below); and the last to serve as a co-Trustee of JOEL FADEN and CYNTHIA S. MARGOLIS shall designate by written instrument as his or her successor any individual or Qualified Trustee.

2.3 Definition: No Bond Requirement. The term "Trustee" as used in this instrument shall mean the initial Trustee and any successor Trustee(s) named herein or designated as provided herein and shall include two (2) persons serving as co-Trustees hereunder. No bond shall be required of anyone serving as a Trustee, whether serving jointly or alone.

2.4 Definition of Qualified Trustee. The term "Qualified Trustee" shall refer to any bank, trust company, or other financial institution duly qualified to act as Trustee pursuant to applicable laws and which is then supervising total trust assets in excess of Five Hundred Million Dollars (adjusted for cost of living increases using an appropriate index selected by the then serving Trustee or the then beneficiaries, if there is no then serving Trustee).

2.5 Trustee Resignation. Any person acting as Trustee of any trust established under this instrument may resign at any time upon giving written notice, thirty (30) days before such resignation shall take effect, to the Settlor, or after the death of the Settlor, to all beneficiaries and to the parent or guardian of any minor beneficiaries. Except when the current-income beneficiary of a trust created hereunder is resigning as sole Trustee of such trust, the resigning Trustee shall render the accounting required under California Probate Code Section 16062 (if any), and shall transfer and deliver to his or her then successor the entire trust estate, and shall thereupon be discharged as Trustee of such trust and shall have no further powers, discretions, rights, obligations or duties with reference to the trust estate, and all such powers, discretions, rights, obligations and duties of the resigning Trustee shall inure to and be binding upon the successor Trustee.

2.6 Manner of Appointment If No Successor Designated. If no successor Trustee is herein designated to act in the event of a resignation of a Trustee (as provided in Paragraph 2.6, above), or no successor Trustee accepts the office, a majority of those to whom such notice of resignation shall be given shall designate a successor Trustee by written notice to the resigning Trustee. In the event a successor Trustee shall not be so designated, the resigning Trustee shall have the right to appoint a successor Trustee which is a Qualified Trustee (as defined above). If a successor Trustee is not designated or appointed as provided above, the resigning Trustee or any such beneficiary of this trust or any trust established pursuant hereto may secure the appointment of a successor Trustee by a court of competent jurisdiction, at the expense of the trust estate.

2.7 No Successor Liable for Acts of Predecessor. No successor Trustee shall be liable for any act, omission or default of a predecessor Trustee. Unless requested in writing by an adult beneficiary of this trust, or any trust established pursuant hereto, or the guardian of a minor beneficiary's estate, no successor Trustee shall have any duty to investigate or review any action of a predecessor Trustee and may accept the accounting records of the predecessor Trustee showing assets on hand without further investigation and without incurring any liability to any person claiming or having an interest in the trust.

2.8 Signature of Both Co-Trustees Required. If at any time two individuals are acting hereunder jointly and collectively as Trustee, the signature of both co-Trustees shall be required for all purposes.

2.9 Trustee Compensation. The Trustee shall be entitled to reasonable compensation, substantially based upon California Probate Code Section 10800 and determined as provided herein. Annual compensation shall be an amount equal to a sliding percentage of the fair market value, determined annually, of the assets less liabilities of the trust computed as follows:

- (a) 4% on the first \$100,000 of value.
- (b) 3% on the next \$100,000 of value.
- (c) 2% on the next \$800,000 of value.
- (d) 1% on the next \$9,000,000 of value.
- (e) 1/2% on the next \$15,000,000 of value.
- (f) 1/4% on the value in excess of \$25,000,000.

If more than one Trustee is serving, the annual compensation shall be divided between or among them as they shall agree and in the absence of such agreement, the compensation shall be divided equally.

2.10 Conflicts of Interest. Any Trustee, or any firm with which a Trustee is affiliated, that performs services in connection with the regular operations of any business, partnership, firm or corporation in which the Settlor's estate or a trust hereunder is financially interested may be compensated for services independently of compensation for services as Trustee hereunder.

The general rule of law whereby actions, decisions or transactions are held to be void or voidable if a Trustee is directly or indirectly interested therein in a non-Trustee capacity shall not be applicable to transactions between the Settlor's estate or any trust under this



instrument and any business entity in which the Trustee is involved. The Settlor recognizes that the dual role of a Trustee may result in situations involving conflicts of interest or self-dealing, and it is the Settlor's express intent that such Trustee shall not be liable as aforesaid, except in the event of his own bad faith or gross negligence. Notwithstanding the foregoing, all such transactions shall be fair and reasonable. The Trustee's power hereunder shall be exercised in good faith for the benefit of the Settlor's estate and the trust estate and in accordance with the usual Trustee obligations, except that the rule against self-dealing shall not be applicable as provided in this paragraph.

A Trustee who is an attorney, accountant, investment advisor or other professional shall not be disqualified from rendering professional services to the Settlor's estate or to this trust or to any trust created hereunder or from being compensated on a reasonable basis therefor in addition to any compensation which he or she is otherwise entitled to receive as Trustee; neither shall a firm with which a Trustee is associated as a partner, officer, principal or employee be disqualified from acting on behalf of the Settlor's estate or for this trust or any trust created hereunder or from being compensated therefor on a reasonable basis. The Settlor is aware that Probate Code Section 15687 restricts the rights of the Settlor's attorney, ARNOLD D. KASSOY, to receive dual compensation for his services as a successor co-Trustee and an attorney on behalf of the Settlor's estate or this trust or any trust created hereunder. The Settlor recommends that the court and/or any beneficiaries of this trust or any trust established hereunder approve of ARNOLD D. KASSOY receiving dual compensation as a co-Trustee and as an attorney. ARNOLD D. KASSOY has been the Settlor's attorney for many years and he is familiar with the Settlor's estate plan, assets and family relationships and the Settlor also feels that his expertise in estate planning, probate and trust law matters would be of benefit to the Settlor's Trust. As a result, ARNOLD D. KASSOY is best situated and it would be in the best interests of the beneficiaries of this trust and any trust created hereunder for ARNOLD D. KASSOY to act as a co-Trustee, should the need arise, while he continues to act as the attorney for the Settlor's estate and this trust or any trust created hereunder. Therefore, the Settlor does not want the issue of fees to dissuade ARNOLD D. KASSOY from acting as a co-Trustee and as such it is the Settlor's intent that he and any law firm of which he is a member be compensated for their respective services on behalf of the Settlor's estate or this trust or any trust created hereunder.

2.11 Exculpation. No Trustee under this trust shall be liable to any person interested in the Settlor's estate or in this trust or in any trust created under this trust for any act or default of that Trustee or of any other Trustee or any other person, unless resulting from that Trustee's own bad faith or gross negligence. Each Trustee shall be indemnified against, held harmless from and provided with a defense to a claim by any beneficiary arising from any act or default of any such fiduciary taken in good faith in his or her role as a Trustee. Each Trustee further shall be entitled to use funds from the trust estate to defend against any such claim.

### ARTICLE 3

#### ADMINISTRATION DURING LIFETIME OF SETTLOR

3.1 Distribution of Income During Settlor's Lifetime. During the lifetime of the Settlor, the Trustee shall pay to the Settlor or apply for his benefit the entire net income of the trust estate, in annual or more frequent installments.

3.2 Distributions of Principal During Settlor's Lifetime. If the Settlor's income is insufficient, the Trustee shall also pay to or apply for the benefit of the Settlor as much of the principal of the trust estate, up to and including the whole thereof, as is necessary for the Settlor's proper support, comfort, welfare, health and maintenance in his accustomed manner of living.

3.3 Liberal Invasion Power. The Trustee shall exercise in a liberal manner the power to invade principal in this Article 3, and the rights of the remainderman in the trust shall be considered of secondary importance. The Trustee shall in no event be held liable for any distribution to the Settlor.

3.4 Power to Encumber Trust Assets. During the Settlor's lifetime, the Trustee shall be empowered to encumber, by mortgage or deed of trust, any real property of the trust; to create a security interest in any personal property of the trust as security for any indebtedness or obligation of the Settlor, whether existing on the date of establishment of this trust or afterward; and to guarantee any obligation of the Settlor.

3.5 Incapacity of Settlor. If at any time, as certified in writing by two (2) licensed physicians, the Settlor becomes physically or mentally incapacitated, whether or not a

court of competent jurisdiction has declared him to be incompetent, mentally ill, or in need of a conservator, the Trustee shall pay to the Settlor or apply for the benefit of the Settlor the entire net income and such amounts of principal as are necessary, in the Trustee's discretion, for the proper health, support, and maintenance of the Settlor in accordance with his accustomed manner of living at the date of this instrument, until the Settlor, as certified by two (2) licensed physicians, is again able to manage his own affairs, or until the death of the Settlor. If a conservator of the person or the estate is appointed for the Settlor, the Trustee shall take into account any payments made for the Settlor's benefit by the conservator. Nothing in this Paragraph 3.5 shall be deemed to limit the Trustee's power to gift pursuant to Paragraph 7.26, below.

#### ARTICLE 4

##### ADMINISTRATION OF TRUST ESTATE ON DEATH OF SETTLOR

4.1 Payment of Debts, Expenses and Taxes. On the death of the Settlor, and subject to any power of appointment exercised by the Settlor (as provided in Paragraph 4.2, below), the Trustee shall pay out of the residue of the trust estate the Settlor's legally enforceable debts, last illness and funeral expenses, trust administration expenses, attorneys' fees and, after conferring with the executor of the Settlor's Will, if any, costs incurred in administering the Settlor's probate estate, if any, and the Settlor's estate and other death taxes (as provided in Article 9, below) arising by reason of the Settlor's death (including interest and penalties thereon).

4.2 General Power of Appointment. On the death of the Settlor, the Trustee shall distribute any remaining balance of the trust estate, including principal and accrued or undistributed income thereof, to such one (1) or more persons and entities, including the Settlor's own estate, and on such terms and conditions, either outright or in trust, and in such proportions as the Settlor shall appoint by Will (or a codicil thereto), specifically referring to and exercising this power of appointment. This power of appointment shall be exercisable by the Settlor alone and in all events.

In the event or to the extent that the Settlor shall have failed to exercise the power of appointment conferred under this Paragraph 4.2, or shall have released or renounced this

power, or an attempted exercise of this power shall have been invalid or ineffective for any reason, the property subject to it shall be added to the property disposed of in Paragraph 4.3, below.

4.3 Disposition of Unappointed Trust Assets. On the death of the Settlor, after making the payments described in Paragraph 4.1, above, and subject to the exercise of the Settlor's power of appointment described in Paragraph 4.2, above, the Trustee shall make the gifts set forth in Paragraph 4.3.1 *et seq.*, below (including the gift in trust for Settlor's spouse as provided in Paragraph 4.3.1.3, *et seq.*) and shall distribute the residue of the trust estate as provided in Paragraph 4.3.2, *et seq.*, below.

4.3.1 Specific Gifts. The Trustee shall distribute the following specific gifts, free of any and all estate, death, inheritance and succession taxes, to the individuals indicated:

4.3.1.1 Specific Gifts of Tangible Personal Property and Real Property. The Trustee shall distribute the following tangible personal property and real property:

(a) All ownership interest in the right to Settlor's name, voice, signature, photograph, likeness and right of privacy/publicity (sometimes referred to as "right of publicity") to the Windfall Foundation, a California Nonprofit Corporation ("THE WINDFALL FOUNDATION"), subject to the restriction that such right of publicity shall not be exploited for a twenty-five (25) year period commencing on the date of Settlor's death. If THE WINDFALL FOUNDATION shall not then exist or if contributions to THE WINDFALL FOUNDATION shall not then qualify for the charitable deduction pursuant to Sections 170(c) and 2055(a) of the Internal Revenue Code, the Trustee shall distribute such right of publicity to such one or more charitable organizations with a similar purpose to that of THE WINDFALL FOUNDATION as the Trustee shall select, contributions to which shall qualify for the charitable deduction pursuant to Sections 170(c) and 2055(a) of the Internal Revenue Code.

(b) Subject to subparagraph (c), below, all of Settlor's clothing, jewelry, personal photos taken prior to his marriage to SUSAN, Settlor's memorabilia and awards in the entertainment industry and the tangible personal property located at 1100 Wall

Road, Napa, CA that the Trustee determines not to sell shall be distributed to Settlor's then living children in substantially equal shares as they shall agree. In the event the children are not able to agree on the division of the foregoing tangible personal property, the Trustee shall decide, in the Trustee's reasonable discretion, which items shall be distributed to each child, which items shall be sold and how much of the proceeds therefrom shall be distributed to each child, and which items shall be gifted to one or more charitable organizations (including the institution holding Settlor's archived material) deemed appropriate by the Trustee and which qualify for the charitable deduction pursuant to Sections 170(c) and 2055(a) of the Internal Revenue Code. The Trustee's determination and decision with regard all of to the foregoing in this subparagraph shall be final and absolute.

(c) The Trustee may, in the Trustee's sole discretion, sell some or all of the contents of 1100 Wall Road, Napa, CA if the Trustee determines such sale shall be in the best interest of the trust. All such sales proceeds shall become a part of the residue distributed pursuant to Paragraph 4.3.2, *et seq.*, below.

4.3.1.2 Specific Gifts of Cash. The Trustee shall distribute the following cash gifts to the individuals indicated below:

(a) The sum of Three Hundred Thousand Dollars (\$300,000) to REBECCA SPENCER if she is employed by Settlor (or an entity controlled by Settlor) at any time during the twelve (12) month period ending on the date of Settlor's death unless terminated for cause.

(b) The sum of One Hundred Fifty Thousand Dollars (\$150,000) to BRIAN NUSS and LORI NUSS in equal shares or entirely to the one of them who survives Settlor provided one of them is employed by Settlor (or an entity controlled by Settlor) at any time during the twelve (12) month period ending on the date of Settlor's death unless terminated for cause.

(c) The sum of One Hundred Thousand Dollars (\$100,000), or two percent (2%) of the value of Settlor's gross estate as determined for federal estate tax purposes, whichever is less, to Settlor's brother, McLaurin Williams. If he fails

to survive Settlor, said gift shall be distributed to his issue who survive Settlor, by right of representation. If no such issue survive Settlor, said gift shall fail and said sum shall be distributed as part of the residue pursuant to Paragraph 4.3.2, below.

(d) The sum of One Hundred Fifty Thousand Dollars (\$150,000) to CYNTHIA S. MARGOLIS.

(e) The sum specified to the following individuals who are employed by Settlor (or an entity controlled by Settlor) at anytime during the twelve (12) month period ending on the date of Settlor's death unless terminated for cause:

(i) To MARIA CASILLAS, the sum of Twenty Thousand Dollars (\$20,000).

(ii) To FRANCISCA DELGADO, the sum of Ten Thousand Dollars (\$10,000).

(iii) To PEDRO DELGADO, the sum of Twenty Thousand Dollars (\$20,000).

(iv) To ASCENCION GIGARROA, the sum of Twenty Thousand Dollars (\$20,000).

(v) To NORBERTO PIMENTEL, the sum of Twenty Thousand Dollars (\$20,000).

(vi) To DANIEL SPENCER, the sum of Twenty Thousand Dollars (\$20,000).

(vii) To GABRIEL FELIX, the sum of Twenty Thousand Dollars (\$20,000).

(viii) To FRANK SCHILLACI, the sum of Ten Thousand Dollars (\$10,000).

Unless otherwise specified, if any individual named in subparagraphs (a) through (e), above, does not survive Settlor, his or her gift shall fail and the amount of such gift shall be added to and become part of the residue of the trust estate which is distributed pursuant to Paragraph 4.3.2, below.

4.3.1.3 Gift in Trust for SUSAN. If Settlor and SUSAN are still married and not separated (as defined below) at Settlor's death, the Trustee shall set aside in a separate trust ("SUSAN's Trust"), which trust shall be held and administered as provided below for the benefit of SUSAN during her remaining lifetime, the following property: (a) Settlor's residence (and the contents thereof excluding items of tangible personal property specifically gifted pursuant to the preceding Paragraph 4.3.1.1, above) located at 95 St. Thomas Way, Tiburon, CA 94920 (the "Residence"); and (b) an amount of cash or other property reasonably determined by the Trustee to constitute an appropriate reserve fund to cover during SUSAN's lifetime all costs related to the Residence including, but not limited to, mortgage or trust deed payments, property taxes and assessments, insurance premiums, maintenance expenses, all ordinary and extraordinary repairs and necessary improvements to the Residence and all obligations to SUSAN under this Paragraph 4.3.1.3, *et seq.* If SUSAN does not survive Settlor, if she survives but is not married to Settlor or if SUSAN and Settlor are married but separated at the date of Settlor's death, this gift shall fail and said property shall be distributed pursuant to Paragraph 4.3.2, below, as part of the residue. For purposes hereof, the term "separated" shall have the same meaning as "separation" has in the Prenuptial Agreement dated September 28, 2011 and in this regard, Settlor and SUSAN shall be deemed separated if a "terminating event" has occurred. A "terminating event" is defined as the first to occur of the following events: (i) the filing and service of a petition for dissolution or divorce, nullity or annulment, or separation or separate maintenance; (ii) the execution of a separation, marital settlement agreement, or other agreement indicative of an intention to terminate the marriage; (iii) the sending of written notice by either of Settlor or SUSAN to the other of an intention to remain apart. Settlor and SUSAN shall not be deemed separated if they are living separate and apart without a terminating event.

(a) During SUSAN's lifetime, SUSAN shall be entitled to reside in the Residence free of rent and to use the furniture and furnishings therein and other contents, in accordance with the terms and conditions of this Paragraph 4.3.1.3 *et seq.*

(b) During SUSAN's lifetime, the Trustee shall pay all mortgage or trust deed obligations, property tax and assessments, insurance premiums, maintenance expenses, ordinary and extraordinary repairs and necessary improvements with respect to the Residence out of income and principal of this Trust in accordance with the principles applicable to the charging of payments under California law. Any remaining net income of this Trust shall be distributed to SUSAN no less often than annually.

(c) Without causing an expiration or termination of SUSAN's occupancy rights and right to net income, SUSAN shall have the right to instruct the Trustee to do the following:

(i) To lease the Residence to a third party for the fair market rental value as determined by the Trustee and to pay to SUSAN the gross rental amount therefrom without reduction for the obligations to be paid by this Trust related to the Residence; or

(ii) To sell the Residence for its fair market value and to purchase a Replacement Residence for an amount equal to or less than the net sales proceeds; and the Replacement Residence and any remaining sales proceeds shall be held in this Trust upon the same terms and conditions of this Paragraph 4.3.1.3 set forth above.

(d) Upon SUSAN's death, any accrued or undistributed net income shall be distributed to SUSAN's estate and the Residence, its contents and any other assets of the trust shall be distributed as provided below:

(i) All of the contents of the Residence other than SUSAN's tangible personal property shall be distributed to Settlor's issue, by right of representation.

(ii) The Residence shall be sold and the Trustee shall allocate the net sales proceeds thereof together with any and all other assets of the Trust (less any related expenses of administration and income and death taxes) into as many equal shares as there are children then living of Settlor, children then living of SUSAN from her first marriage and deceased children of each who leave issue then living. Each share allocated to a



then living child shall be distributed to such child and each share allocated to a group composed of the living issue of a deceased child shall be distributed to such issue by right of representation.

(e) Power to Make SUSAN's Trust Productive. During SUSAN's lifetime, she shall have the power to require the Trustee to make all or any part of the principal of this Trust productive, or to convert promptly any unproductive or underproductive part into productive property. This power shall be exercised by SUSAN in a written instrument delivered to the Trustee.

(f) Settlor's Intention re Marital Deduction. It is the Settlor's intention to enable SUSAN's Trust to qualify in whole or in part for the federal estate tax marital deduction under Section 2056(b)(7) of the Internal Revenue Code, as may be amended from time to time. In no event shall the Trustee take any action or have any power that would impair the marital deduction. If the marital deduction is elected as to all or part of SUSAN's Trust, then all provisions of SUSAN's Trust shall be interpreted to conform to this primary objective.

(g) Power to Reform SUSAN's Trust. The Trustee is authorized, in the Trustee's sole discretion, to either:

(i) Authority to Reform. Reform the terms of SUSAN's Trust to comply with the requirements of Section 2056A of the Internal Revenue Code and the Regulations promulgated thereunder; or

(ii) Authority to Petition Court. Petition any court with jurisdiction over SUSAN's Trust to have the terms of the Trust reformed to comply with the requirements of Section 2056A of the Internal Revenue code and the Regulations promulgated thereunder.

(h) Intent to Comply With Prenuptial Agreement. It is Settlor's intent that this Paragraph 4.3.1.3 et. seq. shall comply with the terms of, and obligations imposed on Settlor under, the Prenuptial Agreement with SUSAN dated September 28, 2011; and the provisions of this paragraph shall be so interpreted.

4.3.2 Distribution of Residue. The Trustee shall divide, hold and administer the entire residue of the trust estate as hereinafter provided. The Trustee shall divide the residue of the trust estate into two shares, the "GST Exempt Share" and the "GST Non-Exempt Share" as described below.

4.3.2.1 GST Exempt Share. The GST Exempt Share shall consist of the assets equal in value to the amount of any generation-skipping transfer tax ("GST") exemption of the Settlor that has been allocated to the GST Exempt Share by the Settlor, the executor (or other personal representative) of the Settlor's Will or the Trustee pursuant to Paragraph 9.2, below.

4.3.2.2 GST Non-Exempt Share. The GST Non-Exempt Share shall consist of the balance of the trust estate.

4.3.2.3 Further Division of GST Exempt Share and GST Non-Exempt Share. The Trustee shall allocate, hold and administer the GST Exempt Share and the GST Non-Exempt Share for the benefit of the Settlor's children and issue of deceased children as provided below. The Trustee shall divide each of the GST Exempt Share and the GST Non-Exempt Share into as many shares as there are children of the Settlor then living and children of the Settlor then deceased leaving issue then living in such a manner and in such proportions so that each such child shall receive, in the aggregate, an equal amount of the total gifts made by the Settlor during his lifetime to all children and total gifts made under this trust (and other trusts established by the Settlor, including but not limited to the Title Holding Trust and Domus Dulcis Domus Holding Trust) to all children. In other words, the Trustee shall divide the GST Exempt Share and the GST Non-Exempt Share in such a manner as to equalize (in the aggregate) the amount each child received from Settlor during his lifetime and receives under this trust (and other trusts established by Settlor) as a result of his death. Accordingly, the Trustee shall allocate one (1) such appropriate share of each of the GST Exempt Share and GST Non-Exempt Share to each living child of the Settlor and one (1) such appropriate share of each share to a group composed of the then living issue of each deceased child of the Settlor. Each share so allocated to a living child of the Settlor shall be a separate trust and shall be held and administered as set forth in Paragraph 4.3.2.4 and Paragraph 4.4, below. The shares allocated to

the issue of a deceased child of the Settlor shall be distributed or held and administered as provided in Paragraph 4.5, below.

4.3.2.4 Separate Child's Trusts from GST Exempt and GST Non-Exempt Shares. Upon the division of the trust estate as set forth in Paragraph 4.3.2.3, above, the Trustee shall hold and administer two (2) trusts for each child (collectively, "Child's Trusts"), one (1) from the GST Exempt Share called the "Child's GST Exempt Trust" and one (1) from the GST Non-Exempt Share called the "Child's GST Non-Exempt Trust". Each child's Child's GST Exempt Trust shall be administered as provided in Paragraph 4.4.1 *et seq.*, below. Each child's Child's GST Non-Exempt Trust shall be administered as provided in Paragraph 4.4.2 *et seq.*, below.

4.4 Trusts for Child. A child's Child's Trusts shall be administered as follows:

4.4.1 Child's GST Exempt Trust.

4.4.1.1 Discretionary Payment of Income to Child. The Trustee shall pay to or apply for the benefit of a child as much of the net income of his or her Child's GST Exempt Trust as the Trustee, in the Trustee's discretion, deems necessary for such child's proper support, health, maintenance, and education. Any income not so distributed shall be accumulated and added to principal. In making discretionary distributions of income under the authority of the preceding sentence, said income shall be paid to or for the benefit of the child first from his or her Child's GST Non-Exempt Trust and only thereafter from his or her Child's GST Exempt Trust.

4.4.1.2 Discretionary Payment of Principal to Child. If the Trustee deems a child's income to be insufficient, the Trustee may also pay to or apply for the benefit of such child as much of the principal of his or her Child's GST Exempt Trust as the Trustee, in the Trustee's discretion, deems necessary for the child's proper support, health, maintenance, and education. In making discretionary distributions of principal under the authority of the preceding sentence, the Trustee shall take into consideration, to the extent the Trustee deems advisable, any income or other resources of the child outside the child's Child's

GST Exempt Trust, known to the Trustee and reasonably available for these purposes (such as the child's Child's GST Non-Exempt Trust from which discretionary principal payments shall be made first) and shall take into consideration generation-skipping transfer tax advantages and trust administration issues.

4.4.1.3 Death of Child; Limited Power of Appointment Over Child's GST Exempt Trust. On the death of a child, the Trustee shall distribute the balance then remaining of his or her Child's GST Exempt Trust (including both principal and any accrued or undistributed income) to one or more of the child's issue then living as the child shall appoint by a signed, notarized instrument other than a Will or a Codicil thereto specifically referring to and exercising this limited power of appointment. If or to the extent that (i) a child shall have failed to exercise the power of appointment conferred upon him or her under this paragraph, (ii) an attempted exercise by a child of the power shall have been invalid or ineffective for any reason, or (iii) a child shall have released or renounced the power, the property subject to this power shall be retained for the benefit of or distributed to a child's then living issue as provided in Paragraph 4.5, below; or if none, to the Settlor's then living issue, outright and free of trust, by right of representation, subject to Paragraph 4.6 and Paragraph 4.7, below.

4.4.2 Child's GST Non-Exempt Trust.

4.4.2.1 Discretionary Payment of Income to Child. The Trustee shall pay to or apply for the benefit of a child as much of the net income of his or her Child's GST Non-Exempt Trust as the Trustee, in the Trustee's discretion, deems necessary for such child's proper support, health, maintenance, and education. Any income not so distributed shall be accumulated and added to principal. In making discretionary distributions of income under the authority of the preceding sentence, said income shall be paid to or for the benefit of a child first from his or her Child's GST Non-Exempt Trust and only thereafter from his or her Child's GST Exempt Trust.

4.4.2.2 Discretionary Payment of Principal to Child. If the Trustee deems a child's income to be insufficient, the Trustee also shall pay to or apply for the benefit of the child as much of the principal of his or her Child's GST Non-Exempt Trust as the Trustee, in the Trustee's discretion, deems necessary for the child's proper support, health,

maintenance, and education. In making discretionary distributions of principal under the authority of the preceding sentence, the Trustee shall take into consideration, to the extent the Trustee deems advisable, any income or other resources of the child outside the child's Child's GST Non-Exempt Trust, known to the Trustee and reasonably available for these purposes. In making discretionary distributions of principal, distributions shall be made first from a child's Child's GST Non-Exempt Trust and only then from his or her Child's GST Exempt Trust.

4.4.2.3 Child's Power to Withdraw Principal. Each child shall have the power to withdraw a portion of the principal of his or her GST Non-Exempt Child's Trust at such intervals as specified below. Any such withdrawal shall be by written instrument specifying the portion to be withdrawn, signed and delivered to the Trustee during the child's lifetime.

(a) Up to one-third (1/3) of the then balance of such Trust upon a child attaining age thirty-five (35).

(b) Up to one-half (1/2) of the then balance of such Trust upon a child attaining age forty-five (45).

(c) Up to the entire remaining balance, together with any undistributed income therefrom, of such Trust upon a child attaining age fifty-five (55), whereupon such Trust shall terminate.

The foregoing withdrawals shall be subject to Paragraph 4.5, below.

A child's power of withdrawal in accordance with the foregoing schedule shall be continuous and cumulative. If, upon the date of establishment of such Child's GST Non-Exempt Trust for a child or any addition to said trust for such child, he or she is entitled to withdraw all or any portion or portions of said trust in accordance with the foregoing plan, the Trustee shall make distribution of any authorized portion the child elects to withdraw upon receipt of a written instrument that specifies the portion withdrawn and is signed by the child. The right of withdrawal hereunder shall be personal to the child and may not be exercised by the child's agent or other legal representative. Any portion of a child's Child's GST Non-Exempt Trust not so withdrawn shall remain in trust to be administered as set forth in this Paragraph 4.4.2. Settlor

strongly encourages each child not to withdraw trust assets, in order to allow such trust assets to continue to be invested by the Trustee and to protect the separate property nature of trust assets in the event the child is married.

4.4.2.4 Death of Child; Contingent General Power of Appointment Over Child's GST Non-Exempt Trust. If or to the extent that the death of a child for whom a Child's GST Non-Exempt Trust is still being held would cause a taxable termination of his or her Child's GST Non-Exempt Trust so that the assets in his or her Child's GST Non-Exempt Trust would be subject to the federal generation-skipping tax if no general power of appointment were given to such child at such child's death, then upon such child's death, the assets in his or her Child's GST Non-Exempt Trust shall be subject to a general power of appointment exercisable by the child in favor of such one or more persons and entities, including the child's estate, on the terms and conditions, either outright or in trust, as the child may appoint by a signed, notarized instrument other than a Will or a Codicil thereto, specifically referring to and exercising this general power of appointment. A child, however, shall have no general power of appointment over assets that would be subject to federal estate tax at a rate equal to or greater than the federal generation-skipping transfer tax rate, even if such assets were subject to a general power of appointment; rather, the child shall have a limited power of appointment over such assets as set forth in Paragraph 4.4.2.5, below.

4.4.2.5 Death of Child; Limited Power of Appointment Over Child's GST Non-Exempt Trust. Upon the death of a child for whom a trust has been held under the provisions of this Paragraph 4.4.2 before being entitled to receive the whole of his or her trust, the Trustee shall distribute the balance then remaining of his or her Child's GST Non-Exempt Trust (including both principal and any accrued or undistributed income) to one or more of such child's issue then living as such child shall appoint by a signed, notarized instrument other than a Will or a Codicil thereto specifically referring to and exercising this limited power of appointment. If or to the extent that (i) the child shall have failed to exercise the powers of appointment conferred upon him or her under Paragraph 4.4.2.4, above, and this Paragraph 4.4.2.5, (ii) an attempted exercise by the child of these powers shall have been invalid or ineffective for any reason, or (iii) the child shall have released or renounced these powers, the property subject to them shall be retained for the benefit of or distributed to the child's then

living issue as provided in Paragraph 4.5, below; and if there are no such issue then living, said property shall be distributed to the Settlor's then living issue, outright and free of trust, by right of representation, subject to Paragraph 4.6 and Paragraph 4.7, below.

4.5 Shares for Issue of Deceased Child. The shares or trusts allocated to a group composed of the living issue of a deceased child of the Settlor shall be divided into as many equal subshares as there are children of the deceased child ("grandchildren" of the Settlor) then living and grandchildren then deceased leaving issue then living. The Trustee shall allocate one (1) such subshare to each living grandchild (who is the child of the deceased child) and one (1) such subshare to each group composed of the living issue of such deceased grandchild.

4.5.1 Share(s) Allocated to Issue of Deceased Grandchild. Each share allocated to a group composed of the living issue of a deceased grandchild shall be distributed to such issue, by right of representation, subject to Paragraph 4.6 and Paragraph 4.7, below.

4.5.2 Share(s) Allocated to a Grandchild — Creation of Separate Trusts. Each share allocated to a living grandchild shall be held, administered and distributed as a separate "Grandchild's Trust" for the benefit of the grandchild as follows:

4.5.3 Discretionary Payments of Income and Principal. The Trustee shall pay to or apply for the benefit of a grandchild as much of the net income and principal of his or her Grandchild's Trust as the Trustee, in the Trustee's discretion, deems necessary for the grandchild's proper health, maintenance, support and education. Any undistributed income shall be accumulated and added to principal. In making discretionary distributions of income and principal pursuant to this subparagraph 4.5.3, the Trustee shall take into consideration, to the extent the Trustee deems advisable, any income or other resources of the grandchild outside this trust, known to the Trustee and reasonably available for these purposes.

4.5.4 Grandchild's Power to Withdraw Principal. Each grandchild shall have the power to withdraw a portion of the principal of his or her Grandchild's Trust at such intervals as specified below. Any such withdrawal shall be by written instrument specifying the portion to be withdrawn, signed and delivered to the Trustee during the grandchild's lifetime.

(a) Up to one-third (1/3) of the then balance of such Trust upon a grandchild attaining age thirty-five (35).

(b) Up to one-half (1/2) of the then balance of such Trust upon a grandchild attaining age forty-five (45).

(c) Up to the entire remaining balance, together with any undistributed income therefrom, of such Trust upon a grandchild attaining age fifty-five (55), whereupon such Trust shall terminate.

The foregoing withdrawals shall be subject to Paragraph 4.6, below.

A grandchild's power of withdrawal in accordance with the foregoing schedule shall be continuous and cumulative. If, upon the date of establishment of a trust for a grandchild or any addition to said trust for such grandchild, he or she is entitled to withdraw all or any portion or portions of said trust in accordance with the foregoing plan, the Trustee shall make distribution of any authorized portion the grandchild elects to withdraw upon receipt of a written instrument that specifies the portion withdrawn and is signed by the grandchild. The right of withdrawal hereunder shall be personal to the grandchild and may not be exercised by the grandchild's agent or other legal representative. Any portion of a grandchild's Grandchild's Trust not so withdrawn shall remain in trust to be administered as set forth in this Paragraph 4.5. Settlor strongly encourages each grandchild not to withdraw trust assets, in order to allow such trust assets to continue to be invested by the Trustee and to protect the separate property nature of trust assets in the event the grandchild is married.

4.5.5 Death of Grandchild; Power of Appointment. If a grandchild dies before becoming entitled to receive full distribution of his or her Grandchild's Trust, the Trustee shall distribute the balance of such Grandchild's Trust to or for the benefit of such one or more persons and entities, including the grandchild's own estate, on such terms and conditions, either outright or in trust, as the grandchild may appoint by a signed, notarized instrument other than a Will or Codicil thereto specifically referring to and exercising this general power of appointment. If or to the extent that (i) a grandchild shall have failed to exercise the power of appointment conferred upon him or her under this paragraph, (ii) an attempted exercise by a grandchild of the



power shall have been invalid or ineffective for any reason, or (iii) a grandchild shall have released or renounced the power, the property subject to such power shall be retained for the benefit of or distributed to such grandchild's then living issue as follows:

(a) If the grandchild leaves issue who are then living, such property shall be distributed to the grandchild's then living issue, by right of representation, subject to Paragraph 4.6 and Paragraph 4.7, below; or

(b) If the grandchild leaves no issue who are then living, such property shall be distributed to the then living issue of the deceased grandchild's parent who is the Settlor's issue, by right of representation; and if there are no such issue, such property shall be distributed to the Settlor's then living issue, by right of representation, subject to Paragraph 4.6 and Paragraph 4.7, below.

4.6 Postponement of Distribution. Notwithstanding anything to the contrary contained herein except Paragraph 4.2, Paragraph 4.4.1.3, Paragraph 4.4.2.4, Paragraph 4.4.2.5 and Paragraph 4.5.5 (regarding powers of appointment), Paragraph 7.26 (regarding the power to make gifts), and Paragraph 8.9 (regarding the Rule Against Perpetuities), the Trustee may postpone the distribution of income and principal of any trust or the partial or complete termination of a trust otherwise directed hereunder, if the Trustee determines, in the Trustee's sole and absolute discretion, that any one (1) or more of the following conditions exists:

- (a) The beneficiary is less than age thirty-five (35);
- (b) The beneficiary lacks legal capacity;
- (c) There is a compelling reason to postpone the distribution, such as a serious physical or mental disability, a propensity toward substance or alcohol abuse, a pending divorce, a potential financial difficulty, or a serious tax disadvantage in making the distribution;
- (d) The beneficiary has clearly manifested an inability to manage financial affairs; or

(e) The property to be distributed is subject to conflicting claims, to tax deficiencies or to liabilities contingent or otherwise.

The good faith determination of the Trustee under subparagraphs (c), (d), and (e) of this Paragraph 4.6 shall be binding on all beneficiaries of this trust and shall not be open to question.

For so long as the conditions giving rise to the postponement continue to exist, the Trustee shall hold, administer and distribute such beneficiary's share of the trust estate as a separate trust as follows: the Trustee may pay to or apply for such beneficiary's benefit as much of the net income and principal of his or her trust as the Trustee, in the Trustee's discretion, deems necessary for the beneficiary's proper support, health, maintenance, and education. Any undistributed income shall be added to principal.

When the conditions giving rise to the postponement cease to exist, the Trustee shall distribute to the beneficiary the portion of his or her trust to which he or she was otherwise entitled and shall resume making distributions of income and principal to such beneficiary, if applicable. However, if such beneficiary dies before becoming entitled to distribution, the Trustee shall distribute the remaining principal, together with any undistributed or accrued income, of such beneficiary's trust to such beneficiary's estate.

4.7 Addition to Trust; No Addition to Trusts if Addition Would Alter Inclusion Ratio. If a part of the balance of any trust under this instrument would otherwise be distributed to a person for whose primary benefit a trust is being administered under this instrument, that part shall be added to such trust and thereafter administered according to its terms. If, under the terms of any trust administered under this instrument, the balance then remaining in such trust is to be added to another trust administered hereunder, said addition shall be made only to a trust with the identical inclusion ratio as defined in Internal Revenue Code Section 2642. If such addition cannot be made to a trust with an identical inclusion ratio then there shall be no such addition, but such balance shall be retained in a separate trust on all the same terms and conditions as such other trust.

4.8 Disposition if No Named Beneficiaries. If at the time of the death of the Settlor or at any later time before full distribution of the trust estate all of the Settlor's issue are

deceased and no other disposition of the property is directed by this instrument, the trust estate then remaining shall be distributed to THE WINDFALL FOUNDATION. If THE WINDFALL FOUNDATION shall not then exist or if contributions to it shall not then qualify for the charitable deduction pursuant to Section 170(c) and 2055(a) of the Code, the Trustee shall distribute the remaining trust estate to such one or more charitable organizations with a similar purpose to that of THE WINDFALL FOUNDATION as the Trustee shall select, contributions to which qualify for the charitable deduction pursuant to Sections 170(c) and 2055(a) of the Code.

#### ARTICLE 5

##### REVOCATION AND AMENDMENT

5.1 Revocation During Lifetime. During the lifetime of the Settlor, this trust may be revoked in whole or in part by an instrument in writing signed by the Settlor and delivered to the Trustee. If this instrument is revoked with respect to all or a major portion of the assets subject to this instrument, the Trustee shall be entitled to retain sufficient assets reasonable to secure payment of liabilities lawfully incurred by the Trustee in the administration of this trust, including Trustee's fees that have been earned, unless the Settlor shall indemnify the Trustee against loss or expense.

5.2 Amendment During Lifetime. The Settlor may at any time during his lifetime amend any of the terms of this instrument by an instrument in writing signed by the Settlor and delivered to the Trustee. No amendment shall substantially increase the duties or liabilities of the Trustee or change the Trustee's compensation without the Trustee's written consent, nor shall the Trustee be obligated to act under any such amendment unless the Trustee accepts it in writing. If a Trustee is removed, the Settlor shall pay to said Trustee any sums due and shall indemnify the Trustee against any liability lawfully incurred by the Trustee in the administration of the trust.

5.3 Powers to Revoke and Amend Are Personal. The powers and right of the Settlor to revoke or amend this trust are personal to him and shall not be exercisable on his behalf by any guardian, conservator or other person, except that revocation or amendment may be authorized after notice to the Trustee by the Court that appointed the guardian or conservator.

ARTICLE 6  
COURT JURISDICTION

Except as otherwise provided herein, the appropriate Superior Court of the State of California shall have jurisdiction for all the purposes set forth in Section 17200 of the California Probate Code.

ARTICLE 7  
POWERS OF TRUSTEE

In order to carry out the provisions of the trust created by this instrument, and subject to any limitations stated elsewhere herein, the Trustee shall have the following powers in addition to those now or hereafter conferred by law:

7.1 Power to Invest and Reinvest. To invest and reinvest all or any part of the trust estate in every kind of property, real, personal or mixed, and every kind of investment, including but not limited to, common or preferred stocks, "puts," "calls," options, shares of investment trusts and investment companies, bonds, debentures, mortgages, deeds of trust (including both first deeds of trust and junior encumbrances), mortgage participations, notes, real estate, mutual funds, index funds, and common trust funds (including funds administered by any corporate Trustee acting hereunder), commodities (including precious stones and precious metals), commodities futures contracts, partnership interests (limited and general), limited liability companies, joint ventures, entities based in the United States or outside the United States, art or art works, or other property as the Trustee, in the Trustee's discretion, may select; and the Trustee may continue to hold in the form in which received (or the form to which changed by reorganization, split-up, stock dividend, or other like occurrence) any securities or other property the Trustee may at any time acquire under this trust, it being the Settlor's express desire and intention that the Trustee shall have the full power to invest and reinvest the trust funds without being restricted to forms of investment that the Trustee otherwise may be permitted to make by law; and the investments need not be diversified.

7.2 Power to Hold Property and to Operate a Business. To continue to hold any property and to operate at the risk of the trust estate any business that the Trustee receives or acquires under the trust as long as the Trustee deems advisable.

7.3 Power to Abandon Property. To abandon any property or interest in property belonging to the trust when, in the Trustee's discretion, such abandonment is in the best interests of the trust and its beneficiaries.

7.4 Power to Manage Securities. To have all the rights, powers and privileges of an owner with respect to the securities held in trust, including, but not limited to, the powers to vote, give proxies, and pay assessments; to participate in voting trusts, pooling agreements, foreclosures, reorganizations, consolidations, mergers and liquidations, and incident to such participation to deposit securities with and transfer title to any protective or other committee on such terms as the Trustee may deem advisable; to exercise or sell stock subscription or conversion rights; and to pledge securities or other assets held in trust in connection with the securing of any loan or guarantee hereunder.

7.5 Power to Hold Securities In Name of Nominee. To hold securities or other property in the Trustee's name as Trustee under this trust, or in the Trustee's own name, or in the name of a nominee, or the Trustee may hold securities unregistered in such condition that ownership will pass by delivery, and to trade securities on margin.

7.6 Power to Manage, Control, Grant Options, Sell. To manage, control, grant options on, sell (for cash or on deferred payments), convey, exchange, partition, divide, improve, and repair trust property; and except as otherwise provided herein, to retain, purchase, or otherwise acquire unproductive or underproductive property.

7.7 Power to Lease. To lease trust property for terms within or beyond the term of the trust for any purpose, including exploration for and removal of gas, oil, and other minerals; and to enter into community oil leases, pooling and unitization agreements.

7.8 Power to Lend to Beneficiary. To lend the principal of the trust to a beneficiary (whether current income beneficiary or remainderman) or to any entity in which a beneficiary of this trust has a substantial direct or indirect interest (including the Settlor's estate

after the Settlor's death) on such terms and at such rates of interest as the Trustee shall determine; and to guarantee any loan to a beneficiary hereunder (whether current income beneficiary or remainderman) as the Trustee may deem advisable.

7.9 Power to Employ Agents and Advisors. To employ any custodian, attorney, accountant, corporate fiduciary or other agent or agents to assist the Trustee in the administration of this trust. Reasonable compensation for all services performed by these agents shall be paid from the trust estate out of either income or principal as the Trustee, in the Trustee's discretion, shall determine, and shall not decrease the compensation to which the Trustee is entitled.

7.10 Power to Purchase. To purchase property at its fair market value as determined by the Trustee, in the Trustee's discretion, from the probate estate of the Settlor.

7.11 Corporate Trustee's Power to Loan or Advance. To loan or advance a corporate Trustee's funds to the trust for any trust purpose, with interest at current rates; to receive security for such loans in the form of a mortgage, pledge, deed of trust or other encumbrance of any assets of the trust; to purchase assets of the trust at their fair market values determined by an independent appraisal of those assets; and to sell property to the trust at a price not in excess of its fair market value as determined by an independent appraisal.

7.12 Power to Disclaim, Release or Restrict Powers. To disclaim, release or to restrict, permanently or for any period of time, the scope of any power that the Trustee may hold in connection with the trust(s) created under this instrument, whether such power is expressly granted in this instrument or is implied by law. The Trustee shall exercise this power in a written instrument specifying the powers to be disclaimed, released, or restricted and the nature of such restriction, said written instrument to be delivered to the then current-income beneficiaries of the trust in question (or to the parent, guardian or conservator of a beneficiary who is under legal disability, as the case may be). Any power disclaimed, released, or restricted by the Trustee shall be extinguished except to the extent that the trust expressly provides that such power shall pass to another, or except to the extent that the written instrument with which the Trustee disclaims, releases, or restricts such power states otherwise.

7.13 Power to Minimize Tax Liabilities. To take any action and to make any election in the Trustee's discretion to minimize the tax liabilities of this trust and its beneficiaries, and to have the power to allocate the benefits among the various beneficiaries, and the Trustee shall have the power to make adjustments in the rights of any beneficiaries, or between the income and principal accounts, to compensate for the consequences of any tax election or any investment or administrative decision that the Trustee believes has had the effect of directly or indirectly preferring one (1) beneficiary or group of beneficiaries over others.

No beneficiary, including any income beneficiary or the remaindermen of any trust, shall have any right to recoupment or restoration of any loss the beneficiary may suffer as a result of any tax election made by the Trustee hereunder or by the personal representative of the estate of the Settlor with respect to the qualification of any marital trust for the marital deduction under Section 2056(b)(7) or 2056A of the Internal Revenue Code, as may be amended from time to time, or the special election under Section 2652(a)(3) of said Code, as may be amended from time to time.

7.14 Power to Borrow. To borrow money, guarantee loans, and to encumber or hypothecate trust property by mortgage, deed of trust, pledge, or otherwise, whether such property is owned wholly by the trust or with a co-owner.

7.15 Power to Commence or Defend Litigation. To commence or defend, at the expense of the trust, such litigation with respect to the trust or any property of the trust estate as the Trustee may deem advisable, and to compromise or otherwise adjust any claims or litigation against or in favor of the trust.

7.16 Power to Carry Insurance. To carry insurance of such kinds and in such amounts as the Trustee deems advisable, at the expense of the trust, to protect the trust estate and the Trustee personally against any hazard.

7.17 Power to Distribute in Non-Pro Rata Shares. To partition, allot and distribute the trust estate, on any division or partial or final distribution of the trust estate, in undivided interests or in kind, or partly in money and partly in kind, at valuations determined by the Trustee, and to sell such property as the Trustee may deem necessary to make division or

distribution. In making any division or partial or final distribution of the trust estate, the Trustee shall be under no obligation to make a pro rata division, or to distribute the same assets to beneficiaries similarly situated; but rather, the Trustee may, in the Trustee's discretion, make a non-pro rata division between trusts or shares and non-pro rata distributions to such beneficiaries, as long as the respective assets allocated to separate trusts or shares, or distributed to such beneficiaries, have equivalent or proportionate fair market values. In selecting assets to be distributed in kind or assets to be sold to facilitate such division or distribution, the Trustee shall have absolute discretion as to the consideration to be given to the income tax basis of each asset involved in the selection, and also shall have absolute discretion, but shall not be required, to make adjustments in the rights of any beneficiaries to compensate for the comparative income tax bases of the assets distributed.

7.18 Power to Allocate Generation-Skipping Transfer Tax Exemption. To allocate all or any portion of the Settlor's generation-skipping transfer tax exemption to any gift or any trust administered under this instrument.

7.19 Power to Divide For Generation-Skipping Transfer Tax Purposes. Upon the allocation of some or all of the Settlor's generation-skipping transfer tax exemption under Internal Revenue Code Section 2631, the Trustee may, if appropriate, divide any trust hereunder into two (2) separate trusts administered under the same terms and conditions in order that the generation-skipping transfer tax inclusion ratio for one (1) such trust shall be "zero" and the inclusion ratio for the other shall be "one."

7.20 Provisions Regarding Division and Funding of Subtrusts for Generation-Skipping Transfer Tax Purposes. Notwithstanding any other provision hereof, if the Trustee is called upon to divide one (1) trust hereunder into two (2) trusts, one (1) which has an inclusion ratio of "one" and the other which has an inclusion ratio of "zero," the Settlor directs the Trustee to make such division in a manner that permits such trusts to be treated as separate trusts in accordance with Treasury Regulations Section 26.2654-1 and any successor thereto, and to fund the trust with an inclusion ratio of "zero" with a pecuniary amount.



7.21 Power to Purchase Life Insurance. To have the power to purchase life insurance policies on the life of any person and to exercise all rights of ownership and control contained in the policies.

7.22 Power to Pay Storage, Packing, Shipping. Upon the death of the Settlor, to pay from the trust estate of any trust all storage, packing, shipping, delivery, insurance and other charges relating to the distribution of property from the trust estate, said payments to be treated as an expense of the trust in question.

7.23 Powers With Respect to S Corporation Stock. The Trustee shall have the following powers with respect to S corporation stock held hereunder:

7.23.1 Power to Divide. If S corporation stock is an asset of, or is transferred to, any trust created hereunder, and such trust does not qualify as a "qualified subchapter S trust" as defined in Internal Revenue Code Section 1361(d)(3), as may be amended from time to time, because of the terms of such trust, the Trustee shall have the power to segregate and retain such S corporation shares in a separate trust for the same beneficiary provided all income of such trust shall be distributed currently to the beneficiary of such trust, as required by Internal Revenue Code Section 1361(d)(3)(B), as may be amended from time to time. Alternatively, the Trustee, in the Trustee's sole discretion, may forgo the creation of a "qualified subchapter S trust" and, instead, make the election to treat the trust holding the S corporation stock as an "electing small business trust" as defined in Internal Revenue Code Section 1361(e)(1), as may be amended from time to time.

7.23.2 Other Powers. If there is any S corporation stock as an asset of this trust, the Trustee is authorized to do any or all of the following:

- (a) Consent to a subchapter S election, including consent for the portion of the tax year prior to the date of the Settlor's death;
- (b) Terminate the subchapter S election, including, the power to revoke or join in a revocation;

- (c) Enter into agreements covering short period allocations;
- (d) Enter into agreements for distributions of income, including distributions of subchapter C earnings and profits;
- (e) Elect installment payment of federal estate taxes and retain S corporation stock during the payment period;
- (f) Sell S corporation stock, including sales which qualify under Internal Revenue Code Section 303, as may be amended from time to time; and
- (g) Distribute S corporation stock to beneficiaries, unequally if necessary, in a manner to preserve the election, including the power to qualify a trust as a qualified subchapter S trust or as an electing small business trust.

7.24 Environmental Considerations. In taking into consideration any environmental concerns that may be relevant to property owned by any trust created hereunder:

7.24.1 Power to Inspect. The Trustee, in the Trustee's discretion, may periodically inspect, review and monitor any and all property held in any trust created hereunder for the purpose of determining compliance with any law, rule or regulation affecting such property, with all expenses of such inspection, review and monitoring to be paid from the trust estate.

7.24.2 Power to Take Action or Abate. The Trustee shall have the power to take any and all action the Trustee, in the Trustee's discretion, deems necessary to prevent, abate, "clean up," or otherwise respond to any actual or threatened violation of any law affecting any property held in any trust created hereunder related to the generation, use, treatment, storage, disposal, release, discharge, or contamination by any materials or substances that are prohibited or regulated by law or that are known to pose a hazard to the environment or human health. Such actions may be taken prior to the initiation of enforcement action by any government agency. The Trustee shall notify the trust beneficiaries as to the estimated costs of such response, and such beneficiaries shall have the right to pay for such response costs or authorize

payment of such costs by the Trustee from the trust estate. Notwithstanding the preceding sentence, the Trustee shall nonetheless be entitled to use trust assets to pay such costs or, in the Trustee's discretion, to resign. The Trustee shall have no personal liability to any beneficiary for the costs incurred pursuant to this Paragraph 7.24.2.

7.24.3 Trustee Not Personally Liable. To the extent permitted by law, the Trustee shall be relieved from all personal liability (including fines, penalties and the cost of any litigation or administrative proceeding) pertaining to any actual or threatened violation of any federal, state or local law, rule or ordinance affecting any property held in any trust related to the generation, use, treatment, storage, disposal, release, discharge or contamination by any materials or substances that are prohibited or regulated by federal, state or local law or that are known to pose a hazard to the environment or human health; provided, however, that the Trustee shall not be relieved from such personal liability resulting from their own gross negligence or willful misconduct. The Trustee shall be indemnified from the assets of the trusts to which such liability relates (to the entire extent thereof) for any such personal liability from which the Trustee has hereby been relieved.

7.25 Power to Create a Special Needs Trust. Notwithstanding any other provision of this trust, no discretionary payments of income or principal shall be used to pay, defray or reimburse any expense paid or payable by any governmental agency or charitable institution for the support of any beneficiary, and the Trustee shall not be compelled to pay, defray or reimburse any such expense. If, during the term of the trust, the beneficiary is institutionalized in a facility operated by or with or reimbursed by or with the funds of any governmental agency, or if public funds are available for the care of or for payments and services to the beneficiary, then (i) no discretionary payments of income or principal shall be paid to or applied for the benefit of the beneficiary, except for those comforts and luxuries not otherwise provided by any publicly funded program or from any other source, public or private, and (ii) no court shall have the authority to direct payments of income or principal to or for the benefit of the beneficiary by reason of any provision of California Trust Law or the common law of California or the laws of any other state, and the Trustee shall have the authority to defend and/or enforce this provision at the expense of the trust estate.

7.26 Power to Make Gifts. During the lifetime of the Settlor, the Trustee, in the Trustee's discretion, shall have the power to make gifts in any one (1) or more of the following circumstances:

7.26.1 As Directed by the Settlor. The Trustee shall make gifts of cash or other property from the trust estate, to such one (1) or more persons and entities on such terms and conditions, either outright or in trust, and in such proportions as the Settlor shall direct in a signed writing delivered to the Trustee.

7.26.2 Continue Gifting Program Established by the Settlor. Subject to the limitations set forth in Paragraph 7.26.4, below, if the Settlor becomes incapacitated (as determined pursuant to Paragraph 3.5, above), then during the lifetime of the Settlor, the Trustee, in the Trustee's discretion, may continue any gifting program established by the Settlor by making gifts from the trust estate unless the Settlor discontinued or intended to discontinue such gifting program prior to becoming incapacitated. The Trustee's decisions as to what constitutes a gifting program and whether the Settlor discontinued or intended to discontinue a gifting program prior to becoming incapacitated shall be binding on all beneficiaries of this trust and shall not be open to question, and the Trustee may rely on any evidence available to him or her in determining whether the Settlor intended to discontinue a gifting program (e.g., oral declarations to the Trustee prior to the incapacitated Settlor's incapacity).

7.26.3 Gifts For Other Purposes. Subject to the limitations set forth in Paragraph 7.26.4, below, if the Settlor becomes incapacitated (as determined pursuant to Paragraph 3.5, above), then during the lifetime of the Settlor, the Trustee shall have the power to make gifts from the Settlor's portion of the trust estate for any purpose, including minimizing current or prospective taxes of the Settlor or the trust estate, as the Trustee, in the Trustee's discretion, shall deem appropriate. The Trustee shall only have the power to make gifts under the provisions of this Paragraph 7.26.3 to the named beneficiaries in this trust who are to receive a specific gift or portion of the trust estate upon the Settlor's death ("permissible donee"), or to any trust established for the benefit of a permissible donee.

7.26.4 Specific Limitation of Power to Make Gifts Pursuant to Paragraph 7.26.2 and Paragraph 7.26.3. In determining whether to exercise the Trustee's power to make

gifts under Paragraph 7.26.2 or 7.26.3, above, the Trustee shall take into consideration all relevant circumstances, including but not limited to, the wishes of the Settlor, known or reasonably known to the Trustee, the Settlor's estate plan, and the value, liquidity and productivity of the trust estate. In no event shall the Trustee have the power to make gifts if the Trustee, in the Trustee's discretion, determines that the trust estate is not more than adequate to provide for the current and foreseeable future needs of the Settlor, given the Settlor's age and physical condition, standard of living and other relevant circumstances, including whether anyone is legally entitled to support from the Settlor, and all other resources of the Settlor known to the Trustee to be reasonably available for such purposes. In the event the Settlor regains her capacity (as determined pursuant to Paragraph 3.5, above), the Trustee's power to make gifts pursuant to either Paragraph 7.26.2 or Paragraph 7.26.3, above, shall cease until such time or time(s), if any, the Settlor may again become incapacitated (as determined pursuant to Paragraph 3.5, above).

7.26.5 Trustee Not Personally Liable. Except in the event of the Trustee's own bad faith or gross negligence, the Trustee shall not be liable for either exercising or failing to exercise the power to make gifts as set forth in this Paragraph 7.26.

7.27 Power to Use Nominee. Any trust assets may be acquired, registered or held in the name of the Trustee, or a nominee of the Trustee, with or without disclosure of fiduciary relationship, in order more readily to facilitate the administration of this trust. However, the Trustee shall be liable for any loss occasioned by the act or omission of the nominee or nominees to the same extent as if the Trustee had so acted or omitted to act. No person dealing with the Trustee's nominee shall have any liability to the Trustee or any other person except as he or she may otherwise agree nor shall he or she be required to take notice of this trust. Any nominee shall be nominated or removed by written instrument, signed and acknowledged by the Trustee and delivered to the nominee so nominated or removed.

7.28 Power to Name Attorney-in-Fact. The Trustee may designate an Attorney-in-Fact to act on the Trustee's behalf by a written instrument, signed and acknowledged by the Trustee and delivered to the Attorney-in-Fact, but the powers of the Attorney-in-Fact shall not exceed the powers the Trustee is legally authorized to delegate.

7.29 Consolidation of Trusts. The Trustee may consolidate any trust with any other trust having substantially identical terms (whether or not under this Trust Agreement), and administer the two as one trust, provided that each portion of the consolidated trust shall terminate and vest in possession no later than the date required for the separate trust from which it came.

ARTICLE 8  
GENERAL PROVISIONS

The following general provisions shall apply to each trust created under this instrument:

8.1 Determination of Income and Principal. Except as otherwise specifically provided in this instrument, the determination of all matters with respect to what is principal and income of the trust estate and the apportionment and allocation of receipts and expenses between these accounts shall be governed by the provisions of the California Uniform Principal and Income Act from time to time existing. Any such matter not provided for either in this instrument or in the California Uniform Principal and Income Act shall be determined by the Trustee in the Trustee's discretion.

8.2 Treatment of Accrued Income. Income accrued or unpaid on trust property when received into the trust shall be treated as any other income. Except as expressly provided herein, income accrued or held undistributed by the Trustee at the termination of any trust created hereunder shall be distributed to the next beneficiaries of the trust in proportion to their interest in it.

8.3 Proration of Taxes and Expenses. Among successive beneficiaries of this trust, all taxes and current expenses shall be prorated over the period to which they relate on a daily basis.

8.4 No Physical Segregation of Trusts Necessary. There need be no physical segregation or division of the various trusts except as segregation or division may be required by the termination of any of the trusts, but the Trustee shall keep separate accounts for the different undivided interests.

8.5 Addition of Property. Other property acceptable to the Trustee may be added to these trusts by any person, by the Will or codicil of the Settlor, by the proceeds of any life insurance, or otherwise.

8.6 Trustee Not Liable for Distribution Made Without Notice of Event Affecting Beneficial Interest. Unless the Trustee shall have received actual written notice of the occurrence of an event affecting the beneficial interests of this trust, the Trustee shall not be liable to any beneficiary of this trust for distribution made as though the event has not occurred; provided, however, that this clause shall not exculpate the Trustee from liability arising from nonpayment of death or generation-skipping taxes that may be payable by the trust on the occurrence of an event affecting the beneficial interests in the trust.

8.7 No Anticipation of Interest. No interest in the principal or income of any trust administered under this instrument shall be anticipated, assigned, encumbered or subject to any creditor's claim or to legal process before its actual receipt by the beneficiary. If the creditor of any beneficiary, other than the Settlor, who is entitled to distributions from a trust established under this instrument shall attempt by any means to subject to the satisfaction of his or her claim such beneficiary's interest in any distribution, then, notwithstanding any other provision herein, until the release of the writ of attachment or garnishment or other process, the distribution set aside for such beneficiary shall be disposed of as follows:

8.7.1 Limited Distribution. The Trustee shall pay to or apply for the benefit of such beneficiary such sums as the Trustee shall determine to be necessary for the reasonable support and education (including study at an institution for higher learning) of the beneficiary according to his or her accustomed manner of living.

8.7.2 Excess Distribution. The portion of the distribution that the Trustee shall determine to be in excess of the amount necessary for such education (including study at an institution of higher learning) and support shall, in the Trustee's discretion, either be added to and become principal in whole or in part or be paid to or applied for the benefit of other beneficiaries then entitled to receive payments from any trust established under this instrument, in proportion to their respective interests in the trust estate; or if there are no other beneficiaries, the excess income may be paid to or applied for the benefit of the person or persons

presumptively entitled to the next eventual interest, in proportion to their respective interest therein.

8.8 California Law to Govern. The validity of this trust and the construction of its beneficial provisions shall be governed by the laws of the State of California in force from time to time. This Paragraph 8.8 shall apply regardless of any change of residence of a Trustee or any beneficiary, or the appointment or substitution of a Trustee residing or doing business in another state.

8.9 Rule Against Perpetuities. Unless sooner terminated in accordance with other provisions of this instrument, each trust created under this instrument shall terminate twenty-one (21) years after the death of the last survivor of SUSAN, the Settlor's children and their issue who are living at the time of the death of the Settlor. All principal and undistributed income of any trust so terminated shall be distributed to the then income beneficiaries of that trust in the same proportion that they are entitled to receive income of the trust estate immediately before termination; provided, however, that if the rights to income are not then fixed by the terms of the trust, distribution under this Paragraph 8.9 shall be made, by right of representation, to such issue of the Settlor as are then entitled or authorized, in the Trustee's discretion, to receive income payments, or if there are no such issue, in equal shares to the beneficiaries who are then entitled or authorized to receive income payments.

8.10 Family Relationship. Any family relationship under this instrument shall be determined as follows:

8.10.1 Issue. The terms "issue" and "issue of the Settlor" shall mean lineal descendants of all degrees, subject to the following limitations:

(a) These terms shall not include adopted persons unless adopted prior to the age of twelve (12);

(b) These terms shall not include persons born out of wedlock unless a "parent-child relationship," as defined under the California Uniform Parentage Act, exists between such person and the one (1) through whom he or she claims benefits under this trust; and



(c) These terms shall include a person born as a result of artificial insemination, in vitro fertilization or other medical intervention, which person shall be deemed to be a genetic descendent of (i) the woman (other than a woman who was contractually serving as a surrogate mother) who gave birth to such person (the "birth mother") and (ii) the birth mother's domestic partner at the time such person was conceived or implanted, unless there is clear and convincing evidence that the birth mother's domestic partner withheld consent to the medical intervention and did not subsequently voluntarily acknowledge parentage. In the event of any question whether (i) a birth mother's domestic partner withheld consent to a medical intervention for purposes of this subparagraph (c), or (ii) parentage has been voluntarily acknowledged for purposes of this subparagraph (c), then the determination of the Trustee (other than the birth mother or the putative parent) shall be binding on all persons interested in the trusts hereunder and on all persons claiming to be so interested.

8.10.2 Child of Settlor. The terms "child of the Settlor," "children of the Settlor" and similar terms, as used herein, shall mean ZACHARY P. WILLIAMS (born April 11, 1983), ZELDA RAE WILLIAMS (born July 31, 1989), and CODY ALAN WILLIAMS (born November 25, 1991).

8.11 Masculine, Feminine and Neuter. As used in this instrument, the masculine, feminine, or neuter gender, and the singular or plural number, shall each include the others whenever the context so indicates.

8.12 Omitted Heirs. Except as otherwise provided in this Agreement, Settlor has intentionally and with full knowledge omitted to provide for any of his heirs who may be living at the date of his death.

8.13 No Contest. If any beneficiary under this instrument, singularly or in combination with any other person or persons, directly or indirectly does any of the acts set forth in Paragraphs 8.13.1, 8.13.2 and 8.13.3, then the right of that person to take any interest given to him or her by this instrument shall be void, and any gift or other interest in the trust property to which the beneficiary would otherwise have been entitled shall pass as if he or she had predeceased the Settlor without issue.

8.13.1 Without probable cause, challenges the validity of this instrument, or the validity of any contract, agreement (including any trust agreement), declaration of trust, trust agreement, beneficiary designation, or other document executed by the Settlor or executed by another for the benefit of the Settlor that is in existence on the date that this instrument is executed on any of the following grounds:

- (a) Forgery;
- (b) Lack of due execution;
- (c) Lack of capacity;
- (d) Menace, duress, fraud, or undue influence;
- (e) Revocation pursuant to the terms of this instrument or other applicable instrument, document, or contract or applicable law;
- (f) Disqualification of a beneficiary who is a "disqualified person" as described in California Probate Code Section 21350 or applicable successor statute.

8.13.2 Files a pleading to challenge the transfer of property under this trust, the Settlor's will, or any contract, agreement, declaration of trust, trust agreement, beneficiary designation or other document executed by Settlor or by another for the benefit of the Settlor, on the grounds that it was not the transferor's property at the time of the transfer;

8.13.3 Files a creditor's claim or prosecutes any action against the trust for any debt alleged to be owed by the Settlor or from this trust to the beneficiary-claimant.

8.14 Expenses of Contest. All costs and expenses incurred in defending any such court action or other legal proceeding and the amount awarded against the Trustee shall be a charge against the trust estate.

8.15 Manner of Making Payments to Minors or Conservatees. The Trustee, in the Trustee's discretion, may make payments to a minor or other beneficiary under disability by making payments to the guardian or conservator of his or her person, to any suitable person with

whom he or she resides, to a Uniform Transfers to Minors Act Account or other similar custodial account established for the beneficiary's benefit (including any such account established by the Trustee for this purpose), or the Trustee may apply payments directly for the beneficiary's benefit. The Trustee, in the Trustee's discretion, may make payments directly to a minor or conservatee if, in the Trustee's judgment, he or she is able to manage his or her financial affairs properly.

8.16 Education of a Beneficiary. Whenever provision is made in this instrument for payment for the "education" of a beneficiary, the term "education" shall be construed to include primary and secondary education, vocational training, college, and post-graduate study, including lessons in non-academic subjects, so long as pursued to advantage by the beneficiary at an institution, public or private, of the beneficiary's choice if the beneficiary has attained age eighteen (18), or at an institution chosen by the parent or guardian of the beneficiary if the beneficiary has not yet attained age eighteen (18). In determining payments to be made for such education, the Trustee shall take into consideration the beneficiary's related travel and living expenses to the extent they are reasonable.

8.17 Internal Revenue Code. Any reference herein to the "Internal Revenue Code" shall refer to the Internal Revenue Code of 1986, as amended, or any corresponding, successor, or substitute provision thereof, including the regulations promulgated with respect thereto.

#### ARTICLE 9

#### DEATH TAXES

9.1 Payment of Death Taxes. Except as otherwise specifically provided in this instrument, or in the Will of the Settlor, all federal estate taxes and state estate, death or succession taxes imposed on the estate of the Settlor by reason of the inclusion of any portion of the trust estate in the gross taxable estate of the Settlor under the provisions of any state or federal tax law, shall be paid by the Trustee from the residue of the trust estate and shall not be charged to, prorated among, or recovered from the persons entitled to the benefits under this trust or any persons receiving assets outside this trust.

All generation-skipping transfer taxes attributable to a direct skip occasioned by the Settlor's death and with respect to which the Settlor is the transferor shall be paid by the Trustee out of and charged against the property constituting the transfer as provided in Internal Revenue Code Sections 2603(a)(3) and 2603(b).

All generation-skipping transfer taxes attributable to a taxable distribution occurring with respect to any trust established hereunder shall be paid by the transferee thereof as provided in Internal Revenue Code Sections 2603(a)(1) and 2603(b), and all generation-skipping transfer taxes attributable to a taxable termination occurring with respect to any trust established hereunder shall be paid by the Trustee and charged against the property constituting the transfer as provided in Internal Revenue Code Sections 2603(a)(2) and 2603(b).

9.2 Trustee to be Deemed Executor for Purposes of Section 2203. If no Executor (or other personal representative) is appointed for the estate of the Settlor, the Trustee shall be deemed to be the "executor" as defined in Section 2203 of the Internal Revenue Code and shall have the authority to exercise all tax and other elections, including, but not limited to, elections pertaining to the generation-skipping tax exemption and the family-owned business deduction under Sections 2652(a) and 2057 of the Internal Revenue Code, as may be amended from time to time. Such authority shall be exercised by the Trustee in such manner as the Trustee, in the Trustee's absolute discretion, shall determine to be in the best interests of the deceased Settlor's estate, these trusts, and the beneficiaries hereof.

9.3 Basis Adjustment. If, at the time of Settlor's death, the tax laws provide for a basis adjustment similar to that provided under IRC Section 1022, and if no Executor has been appointed, or if the law permits the Trustee to so act, or if the nominated Executor allocates such responsibility to the Trustee, then the Trustee shall have the authority to allocate such basis adjustment to assets over which the Trustee has authority under applicable tax laws to make such allocation, wherever such property is located, to and among such assets as the Trustee may direct and appoint by a written instrument delivered to each beneficiary or heir with respect to the specific article or articles to which an allocation is or is not made. The provision of such a written instrument to any beneficiary, heir or other appointee if adult, or if a minor of his or her parent or the person with whom he or she resides, shall be a full and sufficient discharge to the

Trustee from all liabilities with respect to the allocations so made. The Settlor requests, but does not direct, that the Trustee consider the following factors in making such an allocation: (i) possible future income tax rates, (ii) anticipated holding periods for assets, (iii) tax incentives that could minimize or defer the income tax consequences on selling assets, (iv) any wishes expressed to the Trustee by Settlor. These powers shall be exercisable by the Trustee in a fiduciary capacity and the Trustee shall not be liable for any action taken in good faith in the absence of bad faith, intentional misconduct or gross negligence.

9.4 If No Federal Estate Tax or Generation Skipping Transfer Tax.

(a) In the event there is no federal estate tax or generation skipping transfer tax in effect at the death of Settlor, then notwithstanding anything in the Trust Agreement as restated to the contrary, no assets shall be allocated to a GST Exempt (or GST Tax-Exempt) share or Trust, provided, however, that said direction shall be modified as provided in subparagraph (i) below:

i. Amendment of Trust to Reflect Changes in Tax Law: Retroactive Application of Exemption. If, in the judgment of the Executor or the Trustee, at any time after the execution hereof, any statute, regulation, court decision, or administrative ruling imposes different or additional requirements on the trust in connection with the generation-skipping transfer tax, the Executor or the Trustee may petition the court to amend the terms of the trust to meet those requirements and achieve the purpose of this article. In addition, if, at the time of Settlor's death, there is no generation-skipping transfer tax in effect, but such tax is later reinstated and/or applied retroactively, then it is the Settlor's intent that the Executor or the Trustee have the power to allocate so much of a deceased Settlor's generation-skipping transfer tax exemption available to Settlor under Internal Revenue Code Section 2631(a) (or any equivalent successor section), as is necessary to create the lowest possible inclusion ratio under Internal Revenue Code Section 2642(a)(1) with respect to such transfer or such trust, and that such allocation may occur on a retroactive basis, if necessary.

(b) In the further event there is no federal estate tax in effect at the death of Settlor and there is a provision in the Trust Agreement as restated directing that a gift be made to a charitable organization that qualifies for a charitable deduction for federal estate,

income and gift tax purposes, it shall be deemed sufficient if such gift would then qualify for a charitable deduction for federal income tax purposes.

ARTICLE 10

ACCOUNTING

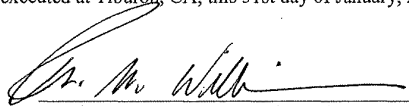
Except as specifically provided herein, the Trustee is not required to render the accounting specified in California Probate Code Section 16062. However, unless the primary beneficiary of a trust being administered hereunder is also acting as Co-Trustee or sole Trustee thereof, upon the death of the Settlor, the Trustee shall render an accounting from time to time regarding the transactions of the trusts created by this instrument by delivering a written accounting to each beneficiary. In the event that a beneficiary is a minor or is under disability, the accounting shall be delivered to the beneficiary's parents or guardian, or the conservator of his or her person, as the case may be. Unless one (1) or more of the beneficiaries (or a minor's parent or guardian, or the conservator of a beneficiary) delivers a written objection to the Trustee within ninety (90) days of the Trustee's accounting, the accounting shall be deemed settled, and shall be final and conclusive in respect to transactions disclosed in the accounting as to all beneficiaries. Notwithstanding Article 6, after settlement of the accounting by reason of the expiration of the ninety (90) day period referred to above or by agreement of the parties, the Trustee shall no longer be liable to any beneficiaries of the trust, including unborn and unascertained beneficiaries, in respect to transactions disclosed in the accounting, except for the Trustee's intentional wrongdoing or fraud.

ARTICLE 11

NAME

This trust may be referred to as the "ROBIN WILLIAMS TRUST." Any separate trust administered hereunder may be known by the name of the principal beneficiary of such trust, or by the name specified in this instrument."

This Trust Agreement is executed at Tiburon, CA, this 31st day of January, 2012.

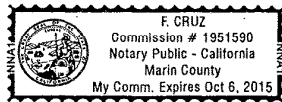
  
 \_\_\_\_\_  
 ROBIN M. WILLIAMS, Settlor and Trustee

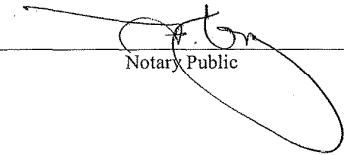
STATE OF CALIFORNIA        )  
   ) ss:  
 COUNTY OF MARIN            )

On JAN. 31, 2012, before me, F. CRUZ, Notary Public, personally appeared ROBIN M. WILLIAMS, who proved to me on the basis of satisfactory evidence to be the person whose name is subscribed to the within instrument and acknowledged to me that he executed the same in his authorized capacity(ies), and that by his signature on the instrument the person, or the entity upon behalf of which the person acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.



  
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 Notary Public

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**PROOF OF SERVICE**

I, Ginie Phan, declare that I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is Kerr & Wagstaffe LLP, 101 Mission St. 18<sup>th</sup> Floor, San Francisco, California 94105.

On March 25, 2015, I served the following document(s):

- **Amended Exhibit A to Petition for Instructions**

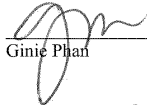
on the parties listed below as follows:

Andrew Bassak	Meredith Bushnell
<b>MANATT, PHELPS &amp; PHILLIPS LLP</b>	<b>ARNOLD &amp; PORTER</b>
One Embarcadero Center, 30th Floor	3 Embarcadero Center, 10th Floor
San Francisco, CA 94111	San Francisco, CA 94111
<i>Attorney For Faden, Joel (Petitioner), Faden, Joel (Trustee), Kassoy, Arnodl D. (Petitioner), And Kassoy, Arnodl D. (Trustee)</i>	<i>Attorney For Cody Williams (Objector), Zachary Williams (Objector), And Zelda Williams (Objector)</i>

- By first class mail** by placing a true copy thereof in a sealed envelope with postage thereon fully prepaid and placing the envelope in the firm's daily mail processing center for mailing in the United States mail at San Francisco, California.
- By electronic service** by submitting a PDF or Microsoft Word file to File & ServeExpress program.
- By personal service** by causing to be personally delivered a true copy thereof to the address(es) listed herein at the location listed herein.
- By Federal Express** or overnight courier.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on March 25, 2015, at San Francisco, California.

  
 \_\_\_\_\_  
 Ginie Phan