

**The “Simple” Private Foundation – Changing One Life at a Time  
Presentation Outline**

**I. INTRODUCTION**

**THE “SIMPLE” PRIVATE FOUNDATION – CHANGING ONE LIFE AT A TIME**

**(This “Introduction” Part 1, Reprinted from an article written in Estate Planning,  
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**I. INTRODUCTION**

On December 22, 2017, Christmas came early for many taxpayers, when President Donald Trump signed the Tax Cuts and Jobs Act of 2017 (“TCJA”), effective for most tax returns filed in 2018. But many in the charitable world are concerned that the TCJA will reduce charitable giving. As the Washington Post reported: “Many U.S. charities are worried the tax overhaul bill ...could spur a landmark shift in philanthropy, speeding along the decline of middle-class donors and transforming charitable gift-making into a pursuit largely left to the wealthy.”<sup>1</sup> The concern is based on the following TCJA changes: 1) the increased amount taxpayers can pass to their families estate tax free, 2) reduced income tax rates, and 3) the increased standard deduction, which reduces the number of taxpayers who will itemize deductions and in turn claim charitable income tax deductions.

The public is most familiar with public charities, such as churches, schools, hospitals, museums and health organizations. Despite the TCJA, public charities may continue to receive their share of donations.<sup>2</sup> Where the projected reduction in charitable giving will likely be felt the most, is with the poor and distressed and at the grass roots level. According to the New York Times, less than 10 percent of charitable donations address basic human needs, like sheltering homeless, feeding the hungry or caring for basic human needs.<sup>3</sup> As Dan Cardinali, president of Independent Sector, a national organization dedicated to advancing philanthropy notes, it is deeply disturbing that the TCJA “is now poised to de-incentivize the heart of civic action in America.”<sup>4</sup>

Particularly alarming to those in the charitable world, is that the expected drop in donations to the poor is occurring at the same time that there is a widening gap between the “haves and the have nots.”<sup>5</sup>

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<sup>1</sup> Frankel, “Charities fear tax bill could turn philanthropy into a pursuit only for the rich.” Washington Post, 12/27/17.

<sup>2</sup> Id. “Nonprofits have long noticed that the wealthy are more likely to cut big checks to support museums and universities, while smaller donors tend to give to social service agencies...”

<sup>3</sup> Strom, “Big Gifts, Tax Breaks and a Debate on Charity,” New York Times, 9/6/07.

<sup>4</sup> Frankel, “Charities fear tax bill could turn philanthropy into a pursuit only for the rich,” Washington Post, 12/27/17.

<sup>5</sup> Nadasen, “Extreme Poverty returns to America,” Washington Post, 12/21/17, citing a U.N. Report on poverty in America.

According to Benjamin Soskis of the Urban Institute’s Center on Nonprofits and Philanthropy: “That’s a trend that has mirrored wealth inequality – the skewing of giving toward fewer but large donations.”<sup>6</sup>

This Article suggests that current law already exists to not only compensate for the expected decrease in donations, particularly to the poor, but also to motivate donors who desire to have a more intimate and immediate effect on their charitable giving. The answer is a private foundation, but not the “private foundation” of the super wealthy, or even the very wealthy, but a private foundation designed for donors who typically give \$3,000 to \$10,000 per year and want their donations to go directly to individuals for charitable purposes. Indeed, according to the IRS and the data collected from 1040’s the average donation to charities is \$4,400.<sup>7</sup> This Article also debunks the accepted notion that the expense, complexity and compliance of creating a private foundation makes it a tool for only the very wealthy.

Part II provides a summary of the TCJA provisions affecting charitable donations. Part III discusses the legal basis allowing private foundations to donate directly to individuals for charitable purposes. Part IV covers the cost, creation and compliance issues pertaining to the “simple” private foundation recommended in this Article. In Part V, the Article concludes that donors, through their private foundations, can make tax deductible charitable contributions directly to individuals within a charitable class to help those individuals most likely to suffer the most under TCJA. And the private foundation can be created and operated without excessive cost or complication.

## **II. The TCJA - Estate and Income Tax Revisions Affecting Charity**

The TCJA’s impact on estate and income tax planning is significant. Turning first to estate tax, the TCJA doubles the taxable threshold per individual to \$11.2 million per person. Thus, for single individuals there is no estate tax unless net assets exceed \$11.2 million upon death. For married couples, there is no estate tax unless the couple’s taxable estates exceed \$22.4 million. Prior to the TCJA, the Tax Policy Center estimated that only about 11,300 estate tax returns will be filed for 2017, of which 5,500 will be taxable.<sup>8</sup> So even before the passage of the TCJA, estate tax affected only the wealthy; now estate tax affects only the very wealthy. The obvious implication for charitable planning is that couples with assets under \$22.4 million no longer have an estate tax incentive to leave assets to charities to reduce their taxable estates.

Turning to the TCJA and income tax, income tax rates have been reduced to a maximum of 37 percent, instead of 39.6%. More importantly from a charitable perspective, the new law almost doubles the

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<sup>6</sup> Id.

<sup>7</sup> Frankel, “Charities fear tax bill could turn philanthropy into a pursuit only for the rich,” *Washington Post*, 12/27/17. The article also reports that the United Way has around 30,000 donors who give \$10,000 a year.

<sup>8</sup> As stated on its Website, The Tax Policy Center is a joint venture of the Urban Institute and Brookings Institution that provides timely, accessible analysis and facts about tax policy to policymakers, journalists, citizens, and researchers.

standard deduction — the amount everyone is allowed to subtract from their taxable income to lower their tax bill — to \$12,000 for singles (up from \$6,350 for 2017) and \$24,000 for married couples who file jointly (up from \$12,700). With a higher standard deduction, less people will itemize their deductions. The Tax Policy Center estimates the number of itemizers will drop from around 1/3 of income tax filers to only 5 percent.

And charitable donations are allowed only when a donor itemizes deductions by listing them separately on the donor's Form 1040. So taxpayers donating tens of thousands of dollars will still itemize, but taxpayers giving \$4,000 or \$5,000 are less motivated to do so.<sup>9</sup> According to one report, charitable giving could decrease by \$13 billion.<sup>10</sup>

The TCJA provisions affecting individuals are scheduled to sunset in 2026, not to mention any federal law can be changed anytime Congress and the President choose. However, for at least the next three to eight years the TCJA applies.

### **III. LAW: YES, YOU CAN CHANGE ONE LIFE AT A TIME**

Charitable donations are expected to decrease in 2018 and future years. If the commentators are correct, the reduction will affect all charities, but the poor and distressed will suffer more than the larger public charities. What can be done about it? One answer is a private foundation to give directly to charitable beneficiaries who are individuals.

What is a 501(c)(3) Charity – Public v. Private. To distinguish between the churches, schools, hospitals and museums mentioned above, that already do and will continue to receive the bulk of charitable donations, and the private foundation recommended herein to help charitable individuals, some background is helpful.

Charities (often referred to as “501(c)(3) organizations”) differ from other tax-exempt organization in two significant ways: (a) they satisfy a charitable purpose under Code Section 501(c)(3);<sup>11</sup> and (b) contributions to charities are tax-deductible. However, not all charities are treated the same. Generally public charities are the more desirable 501(c)(3) organization, while private foundations have greater restrictions.

What distinguishes a public charity from a private foundation? Typically, the key is the amount of public support (some charities such as churches are “public charities” by class regardless of support). Public

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<sup>9</sup> Now married taxpayers will add the maximum \$10,000 allowed for state income and property taxes, allowable mortgage interest and medical expenses, and charitable contributions, and if less than \$24,000 they will not itemize.

<sup>10</sup> Tax Policy and Charitable Giving Results, Indiana University Lilly Family School of Philanthropy, 5/17.

<sup>11</sup> Charitable purposes are varied, but they include, religious, health, educational and scientific purposes, and more general “charitable” purposes. References herein to “Code” or “Section” are to the Internal Revenue Code.

charities generally receive a substantial part of their support from the general public. Therefore, the perception is that the general public serves as a watchdog, and thus less government regulation is required. On the other hand, private foundations typically are created and funded solely by wealthy donors. With limited donors involved in the organization, Congress believes there is a greater opportunity for a private foundation's donors to take advantage of the tax laws for their personal benefit. As a result, there are advantages to being a public charity,<sup>12</sup> while private foundations are subject to additional restrictions and certain excise taxes.<sup>13</sup>

For purposes of this Article, the entity created will be a private foundation because support will likely come solely from one family. Moreover, despite income tax advantages enjoyed by public charities compared to private foundation, those advantages are not consequential for purposes of this Article. And finally, as set forth below, a private foundation is necessary to allow charitable donations directly to individuals within a charitable class.<sup>14</sup>

#### Private Foundations and Legal Support for Distributions Directly to Individuals

The law is clear that tax deductible contributions can be made to private foundations, and private foundations can make "grants" to individuals. Section 4945, which imposes a tax on private foundations and their managers if a private foundation makes a non-qualifying grant to an individual, is the governing Code Section. Section 4945 (g) provides allowable individual grants include those awarded on an objective and nondiscriminatory basis, pursuant to a procedure approved in advance by the IRS, and are for a scholarship or fellowship and used for study at an educational organization. In addition, grants include prizes and awards, and grants to achieve a literary, artistic, musical, scientific, teaching, or other similar capacity, skill, or talent of the grantee.

The bulk of the IRS guidance and commentary pertaining to grants covers the Section 4945(g) grants described above. But separate from Section 4945(g) grants, private foundations can also make grants to individuals who are within a charitable class. For example, Treas. Reg. Section 53.4945-4 (a) (3), provides that grants include funds distributed to indigent individuals to enable them to purchase furniture.

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<sup>12</sup> For example, contributions to public charities are deductible at 50% of the donor's adjusted gross income ("AGI") versus 30% of AGI for contributions to a private foundation. Further, the general rule for contributions of stock to a public charity is that deductions are at fair market value at 30% of AGI, versus the stock basis and 20% of AGI for private foundations.

<sup>13</sup> See IRC Sections 4940 through 4945, which except as noted, are not directly relevant to the gist of this Article.

<sup>14</sup> As stated earlier, the perception that private foundations are only for wealthy donors is not correct, as posited in Section IV.

In later private letter rulings, the IRS approved grants to “indigent individuals and groups to promote the betterment of the general public.” Specifically, the grants were for necessary items such as food, clothing, furniture and other items of basic sustenance.<sup>15</sup> The IRS has also approved grants to individuals that are impoverished and have desperate financial needs due to being (a) victims (or families of victims) of a natural disaster, violence, terrorist act or act of war; (b) impoverished; or (c) victims of discrimination, social injustice or persecution. The IRS stated the grants are permissible because they further a charitable purpose under Section 170(c)(2)(B) and are deductible in their own right, separate from the Section 4945(g) grants for education, travel and the like.<sup>16</sup>

The cornerstone is that the grant must satisfy a charitable purpose.<sup>17</sup> And significantly, the IRS includes within a charitable class those who are “distressed” in a broader sense than solely a financial sense. The IRS has issued a number of rulings listing classes of people qualifying for charitable distributions regardless of whether they are financially distressed. For example, within the class of charitable beneficiaries are the elderly. In **Rev. Rul. 75-198**, 1975-1 C.B. 157, the IRS stated, “the aged, apart from considerations of financial distress alone, are also, as a class, highly susceptible to other forms of distress in the sense that they have special needs.” Other charitable classes include the handicapped,<sup>18</sup> and hospital patients<sup>19</sup>.

One of the most well-known and generous private foundations making charitable grants directly to or for the benefit of individuals is The Sunshine Lady Foundation, Inc., created and funded by Doris Buffett, the sister of Warren Buffett. According to the Sunshine Lady Foundation’s annual tax returns, each year the Foundation makes significant distributions to individuals for charitable purposes. Total distributions to date have been reported to be around \$100 million.<sup>20</sup>

### But what about the Limits for Charitable Deductions?

As noted above, under the TCJA, most married taxpayers will claim the \$24,000 standard deduction because they will not have more than \$24,000 in itemized deductions. Historically, the largest itemized deductions are state and local income and property taxes, mortgage interest deductions, medical expenses, and charitable contributions. But now, with the \$10,000 cap on deducting state and local income and property taxes, and limits on interest and medical expenses, most donors’ charitable contributions will not exceed the \$24,000 floor. But what if the “average” donation of \$4,400 was bundled into a single year donation of \$44,000 to be distributed to beneficiaries over 10 years?

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<sup>15</sup> PLR 8126092.

<sup>16</sup> PLR 200634016. Section 170(c)(2)(B) defines “charitable contribution” as a contribution to any charitable organization for charitable purposes. And Treas. Reg. Section 1.501(c)(3)-1(d)(2) defines “charitable” as including “relief of the poor and distressed or of the underprivileged.”

<sup>17</sup> Id.

<sup>18</sup> Rev. Rul. 79-19, 1979-1 C.B. 195.

<sup>19</sup> Rev. Rul. 68-73, 1968-1 C.B. 251.

<sup>20</sup> Armas and Pagnillo, “Best Practices for Charitable Gifts to Individuals,” Wealth Management.com, 10/5/16.

Granted, that is a significant amount for those typically giving \$4,400 annually, but contributions could also be bundled into, for example, a five year donation of \$22,000. In either event, the charitable donation, coupled with other itemized deductions, again make itemizing worthwhile and contributions income tax advantaged, in at least that year.

Once inside the private foundation, the funds could be used to distribute the \$4,400 per year or more to charitable individuals.<sup>21</sup> The donor could use funds inside her private foundation (or funds outside of the private foundation) to also give to public charities. But the point is this hypothetical donor accomplished two objectives: charitable contributions were again deductible, and the donor had a direct impact in her community, helping those most in need.

#### Why Not a Donor Advised Fund.

Donors can establish a Donor Advised Fund (“DAF”) easily and at low cost. Although they are not without controversy,<sup>22</sup> they are a terrific solution for many interested in charitable giving with little compliance or monitoring. However, DAF’s are not an option for our purposes for one controlling reason: DAF’s are prohibited from making grants to individuals,<sup>23</sup> with narrow exceptions not relevant here.

#### **IV. THE “SIMPLE” PRIVATE FOUNDATION: COST, CREATION AND COMPLIANCE**

The premise of this Article is that a private foundation is the necessary charitable tool to compensate for the decline in giving that will be felt among the poor and distressed – the very recipients most in need of help. Only through a private foundation can contributions be bundled to again allow donors in selected years to itemize and claim deductions for their contributions. Those contributions can then be distributed to beneficiaries in need.

But a common view is that private foundations are only appropriate for the very wealthy who have the time to run them, or if not the time, the resources to retain whatever help they need to do so. For example, common criticisms are the following:

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<sup>21</sup> Section 4942 requires private foundations to distribute 5% of the fair market value of their non-charitable use assets for the current year by the end of the next year. So if the 2018 contribution is \$44,000, then \$2,200 needs to be distributed in 2019, less than the projected payout of \$4,400.

<sup>22</sup> Criticisms include the fees the Funds charge for the money under management and the amount held in accounts without any current gifting requirements.

<sup>23</sup> Section 4966 (c)(1)(A). See the exceptions in Section 4966 (d)(2)(B)(ii).

[Creating a donor advised fund] stands in stark contrast to private foundations, which can take months to establish and require significant time and financial investment, due largely to legal fees... A private foundation must hire staff or ask outside advisors to manage the varied administrative work and tax matters for the foundation. They must also form a board, hold board meetings and record minutes, file state and federal tax returns, and perform other good governance, sometimes at great expense.<sup>24</sup>

But is this true? Or more accurately, is it true for the “simple private foundation” that is the subject of this Article?

### Creating the Foundation

The creation of a private foundation is a two-step process: First, you need an entity under state law, and second you need to file IRS Form 1023 seeking IRS approval with the IRS user fee. The state law entity is typically a trust or a corporation - each is equally acceptable to the IRS. Although corporations are more familiar, primarily because of tradition and a perception that there is greater liability protection, in this instance a trust is recommended. With a trust, there is no state filing or fees. Also, most states limit liability against trustees of tax exempt entities to the amount of trustee compensation.<sup>25</sup> Here, there will not be compensation paid to anyone. The author has received IRS approval for a number of private foundations using the Trust document herein.

What about that the claim that it can take months to create a private foundation? Actually, it is well settled that, upon signing of the Trust document, the private foundation is created and, with a tax identification number, is eligible to receive tax deductible contributions. What takes months is receipt of the IRS Determination Letter approving the foundation. But IRS approval is retroactive to the date the Trust was signed. In this instance, where the charitable purpose is clear, and donors will not be engaging in any danger areas, approval is virtually guaranteed.<sup>26</sup>

Which leads to the second step in the private foundation creation process – filing the necessary IRS form. Once the entity is created by signing the Trust, the private foundation would typically file a Form 1023 with the IRS. However, the “simple” private foundation discussed in this Article could file a 1023-EZ. Eligibility for the Form is determined by filling out the worksheet. The only meaningful limitation is that anticipated annual donations cannot exceed \$50,000 in any of the first three years, which again is not expected under the premise of this Article.

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<sup>24</sup> The Web site for National Philanthropic Trust, a public charity which offers donor advised funds.

<sup>25</sup> E.g., VA Code Section 8.01-220.1:1.

<sup>26</sup> It is the author’s experience that, if the IRS has questions regarding an application, the questions are answered and approval ultimately granted, rather than a rejection.

In sum, the Trust document, requesting a tax number, filing Form 1023-EZ, and paying a \$275 filing fee, creates your “simple private foundation.” Not the months to establish, nor the significant legal fees envisioned by some.

### Operations and Compliance

So it is straightforward to create a private foundation, but what about hiring staff and outside advisors to manage the varied administrative work and tax matters for the foundation? Certainly this is true for the Bill and Melinda Gates Foundation and foundations with significant assets and operations. But our simple private foundation is unlikely to have more than \$50,000 at any time. Certainly a Board (i.e., the trustees) is necessary, but it is likely the trustees will consist solely of “Mr. and Mrs. Donor,” and perhaps their children.

“Minutes” are necessary, but the purpose is to record and maintain meticulous records of the individuals who received the grants, the amounts each recipient received, why the grants were given, and how the recipients were selected.<sup>27</sup> The Minutes should annually record that none of the recipients were related to or had any relationship to the trustees or the trustees’ family. If the facts allow, the Minutes should document how recipients were selected in consultation with churches or local community groups that otherwise benefit the poor.

Annual compliance is also necessary for the 990-PF, the annual private foundation tax return that must be filed each year.<sup>28</sup> Unlike the items above, which can easily be done without outside help, it is wise to hire an experienced CPA to prepare the 990-PF, at least in first year or two of existence, to ensure it is done right. But again, with limited assets, and grants constituting the sole activity, the 990-PF is straightforward.

## **V. Conclusion.**<sup>29</sup>

The coming years will tell whether experts are correct that the TCJA estate and income tax changes reduce charitable giving. If the experts are correct, it is likely those reductions will be felt primarily by those most in need – the poor and distressed. Hopefully the simple private foundation proposed here can combat in part cutbacks in charitable giving. Hopefully the simple private foundation will appeal to donors who desire a front row seat in how their donations can positively impact the poor and distressed in their communities. To see the impact, and receive an income tax deduction for their contributions, is all the better. And doing so without the significant fees and burdensome compliance one hears about regarding private foundations is better still.

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<sup>27</sup> PLR 206344016; PLR 8126092.

<sup>28</sup> Other important compliance issues, but unlikely relevant, is the need to provide documentation to any donors and making records available.

<sup>29</sup> “...we don’t need it all. Other people need it. [That is why] you give it. Pretty simple.” Gregg Popovich, quoted in New York Daily News, 12/26/17.

## II. CONTRIBUTION RULES

### III. WHO CAN FOUNDATION GIVE TO?

#### A. Internal Revenue Code Section 4945

##### **(a) INITIAL TAXES**

###### **(1) ON THE FOUNDATION**

There is hereby imposed on each **taxable expenditure** (as defined in subsection (d)) a tax equal to 20 percent of the amount thereof. The tax imposed by this paragraph shall be paid by the private foundation.

###### **(2) ON THE MANAGEMENT**

There is hereby imposed on the agreement of any **foundation manager** to the making of an expenditure, knowing that it is a **taxable expenditure**, a tax equal to 5 percent of the amount thereof, unless such agreement is not willful and is due to reasonable cause. The tax imposed by this paragraph shall be paid by any foundation manager who agreed to the making of the expenditure.

##### **(b) ADDITIONAL TAXES**

###### **(1) ON THE FOUNDATION**

In any case in which an initial tax is imposed by subsection (a)(1) on a **taxable expenditure** and such expenditure is not corrected within the taxable period, there is hereby imposed a tax equal to 100 percent of the amount of the expenditure. The tax imposed by this paragraph shall be paid by the private foundation.

###### **(2) ON THE MANAGEMENT**

In any case in which an additional tax is imposed by paragraph (1), if a **foundation manager** refused to agree to part or all of the correction, there is hereby imposed a tax equal to 50 percent of the amount of the **taxable expenditure**. The tax imposed by this paragraph shall be paid by any foundation manager who refused to agree to part or all of the correction.

**(d) TAXABLE EXPENDITURE** For purposes of this section, the term “**taxable expenditure**” means any amount paid or incurred by a private foundation—

**(3)** as a grant to an individual for travel, study, or other similar purposes by such individual, unless such grant satisfies the requirements of subsection (g).

**(g) INDIVIDUAL GRANTS** Subsection (d)(3) shall not apply to an individual grant awarded on an objective and nondiscriminatory basis pursuant to a procedure approved in advance by the Secretary, if it is demonstrated to the satisfaction of the Secretary that—

**(1)**

the grant constitutes a scholarship or fellowship grant which would be subject to the provisions of section 117(a) (as in effect on the day before the date of the enactment of the Tax Reform Act of 1986) and is to be used for study at an educational organization described in section 170(b)(1)(A)(ii),

**(2)**

the grant constitutes a prize or award which is subject to the provisions of section 74(b) (without regard to paragraph (3) thereof), if the recipient of such prize or award is selected from the general public, or

**(3)**

the purpose of the grant is to achieve a specific objective, produce a report or other similar product, or improve or enhance a literary, artistic, musical, scientific, teaching, or other similar capacity, skill, or talent of the grantee.

B. Treasury Regulation Section 53.4945-4(a)(3)

**(3) Requirements for individual grants -**

**(i) Grants for other than section 4945(d)(3) purposes.** A grant to an individual for purposes other than those described in section 4945(d) (3) is not a taxable expenditure within the meaning of section 4945(d) (3). For example, if a foundation makes grants to indigent individuals to enable them to purchase furniture, such grants are not taxable expenditures within the meaning of section 4945(d) (3) even if the requirements of section 4945(g) are not met.

C. Revenue Rulings.

- (1) Ltr. Rul 8126092. Grants to “indigent individuals and groups to promote the betterment of the general public,” such as food, clothing, furniture and other items of basic sustenance.
- (2) Ltr. Rul 200634016. Grants that satisfy a charitable purpose are deductible, apart from Section 4945(g) grants for education, travel and the like.
- (3) “Charitable grants” include helping classes that consist of the elderly (Rev. Rul. 75-198; 1975-1 CB 157); handicapped (Rev. Rul. 79-19, 1979-1 CB 195); and hospital patients (Rev. Rul 68-73, 1968-1 CB 251).

## IV. HOW TO CREATE THE FOUNDATION

### Sample Drafting Language for Private Foundation

#### DONNY AND DEBBIE DONOR FOUNDATION

On this \_\_\_\_ day of \_\_\_\_\_, 2018, this Trust Agreement is made by and among DONNY DONOR ("Trustor"), and DONNY DONOR and DEBBIE DONOR (collectively, "Trustees").

#### ARTICLE 1. ESTABLISHMENT

Trustor hereby establishes the DONNY AND DEBBIE DONOR FOUNDATION (the "Foundation").

#### ARTICLE 2. TRUST ESTATE; TRUSTEES

1. Trust Estate. Trustees acknowledge receipt of the property of Trustor described in the attached Schedule A which, together with any other property hereafter transferred to and accepted by Trustees, shall constitute the "trust estate" and shall be administered by Trustees as provided in this agreement.
2. Trustees. The Foundation shall have no fewer than two and no more than seven Trustees. The number of Trustees may be increased or decreased from time to time by agreement of all Trustees.

#### ARTICLE 3. PURPOSE

The Foundation is organized exclusively for charitable, religious, educational, and/or scientific purposes under section 501(c)(3) of the Internal Revenue Code.

The Foundation will promote charitable purposes, including to make funds available to a broad range of charitable organizations and individuals whose needs correspond to the philanthropic goals of its Trustees and come within the charitable purposes outlined in Section 501(c)(3) of the Internal Revenue Code, provided, however, that:

- (a) no part of the Foundation's net earnings or assets will, either directly or indirectly, inure to the benefit of the Foundation's Trustor, Trustees, or any of its employees or their families, or any private individual (except that reasonable compensation may be paid for services rendered to or on behalf of the Foundation, and payments and distributions may be made in furtherance of the purposes set forth in this Article 3);
- (b) no substantial part of the activities of the Foundation shall consist of carrying on propaganda or otherwise attempting to influence legislation (except as may be permitted by Section 501(h) of the Internal Revenue Code, as amended), and the Foundation shall not participate in or intervene in (including the publication or distribution of statements) any political campaign on behalf of any candidate for public office, nor shall the Foundation engage in any activities that are unlawful under applicable federal, state, or local law;
- (c) the Foundation shall not be operated for profit, and it shall not carry on any other activities not permitted to be carried on by a trust exempt from federal income tax under Section 501(c)(3) of the Internal Revenue Code, or by a trust to which contributions are deductible under Section 170(c)(2) of the Internal Revenue Code; and
- (d) during such time that the Foundation is deemed to be a private foundation, as defined in Section 509 of the Internal Revenue Code, as amended, the Foundation shall

distribute its income and principal, if necessary, in such manner as not to subject the Foundation to tax liability under Section 4942(a) of the Internal Revenue Code, as amended, and the Foundation shall not engage in any act of self-dealing (as defined in Section 4941(d) of the Internal Revenue Code, as amended), retain any excess business holdings (as defined in Section 4943(c) of the Internal Revenue Code, as amended), make any investment which would jeopardize the carrying out of any of its exempt purposes under Section 4944 of the Internal Revenue Code, as amended, or make any taxable expenditures (as defined in Section 4945(d) of the Internal Revenue Code, as amended).

#### **ARTICLE 4. OPERATIONS**

The Foundation shall engage in activities that benefit or support the charitable purposes set forth in ARTICLE 3 above.

#### **ARTICLE 5. CONSTRUCTION: RESTRICTIONS**

The Foundation is constituted as a tax exempt trust under Virginia law. Trustees intend that the Foundation qualify as an organization exempt from federal income taxation as a private foundation under Code Section 501(c)(3), meaning such organization is organized exclusively for charitable, religious, educational, and scientific purposes, including, for such purposes, the making of distributions to organizations that qualify as exempt organizations under Code Section 501(c)(3), or corresponding section of any future tax code. This agreement shall be construed accordingly, and all powers and authority of Trustees shall be limited accordingly. Trustees shall have the power to amend this instrument in order to comply with the requirements of Code Sections 501(c)(3), and 509, and the Regulations thereunder, and any such amendment shall be deemed effective as of the date of creation of the trust. Notwithstanding any other provision of this document, the Foundation shall not carry on any other activities not permitted to be carried on (a) by an organization exempt from federal income tax under Code Section 501(c)(3), or corresponding section of any future federal tax code, or (b) by an organization, contributions to which are deductible under Code Section 170(c)(2), or corresponding section of any future federal tax code.

#### **ARTICLE 6. FISCAL YEAR**

The fiscal year of the Foundation shall end on the last day of December, or such other date as may be fixed from time to time by Trustees.

#### **ARTICLE 7. DISSOLUTION**

Upon the dissolution and final liquidation of the Foundation, and after paying or making provision for the payment of all debts and liabilities of the Foundation, Trustees shall distribute all remaining assets of the trust estate to one or more organizations designated by the Trustees of the Foundation. All organization designated by the Trustees must be duly qualified, organized and operated exclusively for exempt purposes, within the meaning of Section 501(c)(3) of the Internal Revenue Code. Any assets not so distributed shall be distributed by a court of competent jurisdiction in the county or city in which the trust is located, exclusively for such purposes or to such organizations as such court shall determine, which are organized and operated exclusively for such exempt purposes, or to the federal government or a state or local government to be used for a public purpose.

#### **ARTICLE 8. CREATION OF CORPORATION**

Trustees are authorized and empowered to form and organize a nonprofit corporation for the uses and purposes of the Foundation, and qualifying as a public charity or a private

foundation under Code Sections 501(c)(3) and 509. Such corporation, if organized, shall be named the DONNY AND DEBBIE DONOR FOUNDATION, INC. Upon the creation and organization of such corporation, Trustees are authorized and empowered to convey, transfer and deliver to such corporation all the property and assets to which the Foundation may be or become entitled. It is the purpose of this ARTICLE 8 that the board of directors of such corporation, if incorporated and organized as provided by this ARTICLE 8, shall take the place of Trustees, who shall be the incorporators of such corporation.

## **ARTICLE 9. GENERAL ADMINISTRATIVE PROVISIONS**

Duties of Trustees - -

1. Annual Accounting. After the end of each fiscal year for the trust, Trustees shall prepare a statement or statements showing: (a) how the property of the trust is invested; and (b) all transactions relating to the trust for the preceding fiscal year. Trustees shall maintain the accounting statement or statements with the permanent records of the trust.
2. Investments. In acquiring, investing, reinvesting, exchanging, self-dealing, and managing the property of the trust, Trustees shall exercise the judgment and care, under the circumstances then prevailing, which persons of prudence, discretion, and intelligence exercise in the management of their own affairs, not in regard to speculation, but in regard to the permanent disposition of their funds. In determining the prudence of a particular investment, Trustees shall consider the proposed investment or investment course of action in relation to all property of the trust. Trustees may delegate to others such duties, powers (including discretionary powers), and authority as Trustees think necessary or proper. Trustees may incorporate, or join with others in the incorporation of, any unincorporated firm, business, or business property. If any asset donated to this Trust does not meet the requirements of the prudent man standard, the Trustee may nevertheless retain the asset for so long as the Trustee may deem appropriate.
3. Income. If all the income of the property of the trust is not distributed or applied during a fiscal year, Trustees shall add the undistributed portion to principal.
4. Capital Gains and Losses. Trustees shall allocate long-term capital gains and losses to principal.
5. Common Trust Funds. If a corporation is serving as a Trustee, Trustees may invest all or any portion of the property of the trust in a common trust fund maintained by the corporate Trustee, to which Code Section 584 applies. Trustees shall maintain separate accounts and records which will sufficiently identify the portion of the total common trust fund which constitutes the property of the trust, and the income earned by, or attributable to, such portion.
6. Powers of Trustees. Trustor grants to Trustees the continuing, absolute, discretionary power to deal with any property, real or personal, held in the trust estate as freely as Trustor might in the handling of Trustor's own affairs. In addition, Trustees shall have all of the power, authority and discretion given a trustee under the laws of the Commonwealth of Virginia on this date, including those set forth in Sections 64.2-105 and 64.2-778 of the Code of Virginia (or any successor provisions thereto), which powers are incorporated in this Agreement by this reference. Such powers may be exercised independently and without the approval of any court in Virginia or any other jurisdiction. Such powers shall be exercised by

a majority vote of the Trustees, however, Trustees may delegate to a single Trustee the ability to do any acts that the Trustees could vote on collectively.

7. Fees and Expenses of Trustees; Bond. Trustees shall be entitled to reasonable compensation for the acceptance and administration of the trust and for the payments and distributions made by Trustees. Trustees are entitled to extra compensation for unusual or extraordinary services. Trustees shall be reimbursed for all expenses reasonably incurred in the administration of the trust. No bond or other security shall be required of Trustees or any of them in any jurisdiction.

8. Resignation of Trustee; Appointment of Successor Trustee, Officers. Any Trustee shall have the right to resign as a Trustee without court proceedings. The remaining Trustees shall have the right, without court proceedings, to appoint a successor Trustee by a majority vote. No successor Trustee shall be liable for the acts or omissions of any prior Trustee. Trustees may be removed by a majority vote of the Trustees and the remaining Trustees shall have the right, without court proceedings, to appoint a successor Trustee. Trustees may be added as Trustees by the majority vote of the then serving Trustees. DONNY DONOR shall serve as the Foundation's Chairman; DEBBIE DONOR shall serve as the Foundation's President and Secretary. If DONNY DONOR or DEBBIE DONOR shall be unable or unwilling to serve, then the DONORS' children shall serve successor Co-Trustees of the Foundation.

9. Extent of Liability. Trustees shall have the duty to act in good faith and with reasonable care and, in the absence of affirmative evidence to the contrary, shall be deemed to have so acted.

10. Liability of Trustee and Former Trustees.

A. No Trustee or former Trustee (collectively referred to in this Agreement as the "Indemnified Group") shall be personally liable for:

- (1) any liability or obligation of the Trust under any agreement;
- (2) errors in judgment (including acting in reliance on the opinion of legal counsel or public accountants or believing in good faith that he or she is acting within the authority granted in this Agreement);
- (3) any acts or omissions that do not constitute fraud, gross negligence or willful misconduct; or
- (4) the negligence, whether of omission or commission, dishonesty or bad faith of any employee or agent selected and supervised by a member of the Indemnified Group with reasonable care or of any other member of the Indemnified Group; but each member of the Indemnified Group shall be liable only for his or her respective fraud, gross negligence or willful misconduct.

B. In any threatened, pending or completed action, suit, or proceeding (civil or criminal) to which a member of the Indemnified Group was or is a party or is threatened to be made a party by reason of the fact that he or she is or was a Trustee of a Trust, or because he or she executed an agreement for the benefit of a Trust, that Trust shall indemnify and hold harmless that member of the Indemnified Group against all expenses (including reasonable attorneys' and accountants' fees, court costs and expenses), judgments and amounts paid in settlement actually and reasonably incurred by him or her in connection with that action, suit or proceeding if the conduct of that member of the Indemnified Group did not constitute fraud, gross negligence or willful misconduct.

C. To the extent that a member of the Indemnified Group has been successful on the merits in seeking indemnification in accordance with this ARTICLE 9, Section 10, the Trust shall indemnify him or her and hold him or her harmless against the expenses (including

reasonable attorneys' and accountants' fees, court costs and expenses) actually and reasonably incurred by him or her in seeking that indemnification.

D. For purposes of ARTICLE 9, Sections 10(B) and 10(C), the termination of any action, suit or proceeding by judgment, order, settlement or otherwise shall not create a presumption that the conduct of a member of the Indemnified Group constituted fraud, gross negligence or willful misconduct.

E. Expenses (including reasonable attorneys' and accountants' fees, court costs and expenses) incurred in defending any claim, action, suit or proceeding (civil or criminal) shall be paid by the Trust in advance of final disposition of the matter upon receipt of an undertaking by or on behalf of that member of the Indemnified Group to repay that amount if that member of the Indemnified Group is ultimately determined not to be entitled to be indemnified.

**ARTICLE 10. LAW GOVERNING; SAVINGS CLAUSE**

This instrument shall be governed by the laws of the Commonwealth of Virginia. Any provision prohibited by law or unenforceable shall not affect the remaining provisions of this instrument. However, in any conflict with Code Sections 501(c)(3) or 509 of the Code and the Regulations thereunder, those Code sections and the Regulations shall govern.

EXECUTED by Trustor and Trustees on the day and year first above written. This Agreement may be signed in counterparts, each of which will constitute an original.

TRUSTOR:

\_\_\_\_\_  
DONNY DONOR

TRUSTEES:

\_\_\_\_\_  
DONNY DONOR

\_\_\_\_\_  
DEBBIE DONOR

I, the undersigned, a Notary Public in and for the jurisdiction aforesaid do hereby certify that DONNY DONOR and DEBBIE DONOR personally known to me to be (or satisfactorily proven to be) the persons whose names are signed to the foregoing Trust Agreement, has acknowledged the same before me in my jurisdiction aforesaid.

GIVEN under my hand and seal this \_\_\_\_ day of \_\_\_\_\_, 2018.

\_\_\_\_\_  
NOTARY PUBLIC

## V. COMPLIANCE

### Questions for Determining Eligibility to File Form 1023-EZ

All answers must be “no” to file the 1023-EZ.

1. Do you project that your annual gross receipts will exceed \$50,000 in any of the next 3 years?
2. Have your annual gross receipts exceeded \$50,000 in any of the past 3 years?
3. Do you have total assets the fair market value of which is in excess of \$250,000?
4. Were you formed under the laws of a foreign country (United States territories and possessions are not considered foreign countries)?
5. Is your mailing address in a foreign country (United States territories and possessions are not considered foreign countries)?
6. Are you a successor to, or controlled by, an entity suspended under section 501(p) (suspension of tax-exempt status of terrorist organizations)?
7. Are you organized as an entity other than a corporation, unincorporated association, or trust?
8. Are you formed as a for-profit entity?
9. Are you a successor to a for-profit entity?
10. Were you previously revoked or are you a successor to a previously revoked organization (other than an organization the tax-exempt status of which was automatically revoked for failure to file a Form 990-series return for three consecutive years)?
11. Are you currently recognized as a tax-exempt under another section of IRC 501(a) or were you previously exempt under another section of IRC 501(a)?
12. Are you a church or a convention or association of churches described in section 170(b)(1)(A)(i)?
13. Are you a school, college, or university described in section 170(b)(1)(A)(ii)?
14. Are you a hospital or medical research organization described in section 170(b)(1)(A)(iii) or a hospital organization described in section 501(r)(2)(A)(i)?
15. Are you an agricultural research organization described in section 170(b)(1)(A)(ix)?
16. Are you applying for exemption as a cooperative hospital service organization under section 501(e)?
17. Are you applying for exemption as a cooperative service organization of operating educational organizations under section 501(f)?
18. Are you applying for exemption as a qualified charitable risk pool under section 501(n)?
19. Are you requesting classification as a supporting organization under section 509(a)(3)?
20. Is a substantial purpose of your activities to provide assistance to individuals through credit counseling activities such as budgeting, personal finance, financial literacy, mortgage foreclosure assistance, or other consumer credit areas?
21. Do you or will you invest 5% or more of your total assets in securities or funds that are not publicly traded?
22. Do you participate, or intend to participate, in partnerships (including entities or arrangements treated as partnerships for federal tax purposes) in which you share losses with partners other than section 501(c)(3) organizations?
23. Do you sell, or intend to sell carbon credits or carbon offsets?
24. Are you a Health Maintenance Organization (HMO)?
25. Are you an Accountable Care Organization (ACO), or an organization that engages in, or intends to engage in, ACO activities (such as participation in the Medicare Shared Savings Program (MSSP) or in activities unrelated to the MSSP described in Notice 2011-20, 2011-16 I.R.B. 652)?

26. Do you maintain or intend to maintain one or more donor advised funds?
27. Are you organized and operated exclusively for testing for public safety and requesting a foundation classification under section 509(a)(4)?
28. Are you requesting classification as a private operating foundation?
29. Are you applying for retroactive reinstatement of exemption under section 5 or 6 of Rev. Proc. 2014-11, after being automatically revoked?