Source: Estate Planning/Complete Plans for Small and Mid-Size Estates/Contents

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Preface

There are many books on estate planning and on document drafting that focus on one type of document: a will, a revocable or irrevocable trust, or durable power of attorney, for example. This book takes a new and different approach. It views estate planning from the perspective of a practitioner who is not necessarily an estate planning certified specialist.

Our practitioner first must be able to identify which estate planning clients have assets and personal situations that require the services of an estate planner with more experience and more expertise. Usually, this eliminates clients who have great wealth. In other words, this is a book for estate planners with primarily middle-income or lower-income clients.

Once the client has been identified, the attorney then must address that client's goals and create a comprehensive estate plan that takes into account all of the client's assets. The plan may include a will or a trust with a pourover will, durable powers of attorney, beneficiary designations, and instructions regarding joint tenancy assets. The plan must also take into account the client's minor children, if any, and the persons the client will name as fiduciaries, and must address any other specific issues the client is concerned about.

The authors have created chapters with real-life hypothetical clients who have families, friends, and a specific group of assets and concerns. In each of these chapters, the issues are presented to the client just as a real attorney would present them. The client makes his or her decisions and the attorney then drafts the estate planning documents in accordance with the client's decisions and sends the drafts to the client with a transmittal letter summarizing the documents and the plan as a whole. The final chapter presents common problems that estate planning attorneys encounter after sending out drafts, suggests responses, and then discusses and gives samples of the various documents that are typically used to implement the estate plan.

The book was written and reviewed by leading practitioners and specialists in estate planning, who gave generously of their time and expertise. The authors' biographies appear in the About the Authors section that follows this Preface.

The following individuals served as consultants on this book by helping us in the planning process to identify the most important issues and by reviewing and commenting on chapters within their areas of expertise. Their valuable suggestions have made the book more accurate, more practical, and more reflective of California practice. CEB is indebted to each:

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November 2009 Update

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Selected Developments

November 2009 Update

WARNING: Unless Congress takes further action, the estate tax is scheduled to be repealed for the estates of decedents dying in tax year 2010. IRC §§2010(c), 2210(a). Further, unless Congress takes further action, the gift tax is not repealed, and a separate gift tax schedule that effectively imposes a single 35-percent tax rate will apply in 2010. IRC §2502(a)(2). In 2011, the unified estate and gift rates will be revived with a $1 million applicable exclusion amount. Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA-2001), §901 (Pub L 107-16, §901, 115 Stat 38). At press time, Congress had not taken action to alter these scheduled changes. Readers are warned to be alert for legislative developments.

In *Chang v Lederman* (2009) 172 CA4th 67, 90 CR3d 758, the court balanced established case law factors for determining whether a testator's attorney has a duty of care to an intended beneficiary and held that there was no duty under the facts of the case. See §2.40.

The discussion of Circular 230 has been reorganized, expanded, and rewritten. See §§2.57-2.60C.

Beginning in 2010, a donor must provide the donee with information about the adjusted basis and fair market value of gifted property. IRC §6019. (This is a result of a prospective amendment made in 2001 by Pub L 107-16, 115 Stat 38.) See §3.2.

Beginning in 2010, gifts will be taxed at the donor's highest personal income tax rate. IRC §2502(a). (This is a result of a prospective amendment made in 2001 by Pub L 107-16, 115 Stat 38.) See §3.4.

The inflation-adjusted annual gift tax exclusion for calendar year 2009 is $13,000. Rev Proc 2008-66, 2008-45 Int Rev Bull 1107. See §3.13. See also §§3.20, 6.3.

Beginning in 2010, any transfer to a trust, other than a trust treated as a grantor trust of the donor or the donor's spouse, will be treated as a gift. IRC §2511(c). (This is a result of a prospective amendment made in 2001 by Pub L 107-16, 115 Stat 38.) See §3.13. See also §3.19.

For tax year 2009, the "kiddie tax" income reduction under the alternative allowing twice the standard deduction amount for a dependent child is $1900. Rev Proc 2008-66, 2008-45 Int Rev Bull 1107. See §3.90.

The 2009 inflation-adjusted income tax rates for estates and trusts (Rev Proc 2008-66, 2008-45 Int Rev Bull 1107) are included in §3.97.

New material has been added discussing the $1.3 million special allowance for increasing the aggregate basis of a decedent's eligible noncash appreciated assets (IRC §1022), due to take effect for decedents dying in 2010, when scheduled repeal of the estate tax will become effective. See §3.108.

A new section has been added regarding tax return preparer penalties. See §3.109.

Language in an agreement to transmute separate property to community property that purports to limit the purpose of the transmutation to estate planning only will not be enforceable in a subsequent dissolution, legal separation, or termination of registered domestic partnership. *Marriage of Lund* (2009) 174 CA4th 40, 94 CR3d 84; *Marriage of Holtemann* (2008) 166 CA4th 1166, 83 CR3d 385. See §4.8.

In November 2008, Proposition 8 amended the California Constitution to limit marriage to opposite-sex couples. The validity of Proposition 8 was ultimately upheld by the California Supreme Court. *Strauss v Horton* (2009) 46 C4th 364, 93 CR3d 591. The court also determined that same-sex marriages that took place between the date of the court's decision in *In re Marriage Cases* (2008) 43 C4th 757, 76 CR3d 683, and the date of the passage of Proposition 8, were valid. See §4.16.

For 2009, the inflation-adjusted estate tax reduction in value for farms, ranches, and vineyards that are "qualified real property" under IRC §2032A is $1 million. Rev Proc 2008-66, 2008-45 Int Rev Bull 1107. See §5.33.

For 2009, the annual exemption for gifts to a noncitizen spouse is $133,000. Rev Proc 2008-66, 2008-45 Int Rev Bull 1107. See §3.22. See also §6.9.

Reporting to the IRS is required if the value of the aggregate foreign gifts received by a United States person (citizen or resident noncitizen) exceeds $14,139 in tax year 2009. Rev Proc 2008-66, 2008-45 Int Rev Bull 1107. See §6.11.

Effective for plan years beginning after December 31, 2009, retirement plan distributions to a nonspouse beneficiary's inherited IRA are considered "eligible rollover distributions," and plans are thus required to allow these direct rollovers. IRC §402(f)(2)(A), (c)(11), as amended by Pub L 110-458, 122 Stat 5092, §108(f). See §6.24.

New IRC §401(a)(9)(H) eliminates the need for participants and beneficiaries of most retirement plans to take required minimum distributions during 2009. If a beneficiary is required to withdraw the entire balance of the plan over 5 years because the

participant died before the required beginning date, calendar year 2009 is not counted, resulting in a 1-year extension of the withdrawal period. See §6.24.

The discussion of SSI income limits in §6.43 has been expanded to set out the amounts for both uncounted unearned income and uncounted earned income.

The figures in §6.44 and the example in that section have been updated to reflect 2009 SSI benefit reductions for beneficiaries who also receive in-kind support and maintenance.

The California Welfare and Institutions Code has been amended to conform to Medicaid (Medi-Cal) eligibility requirements imposed by the federal Deficit Reduction Act of 2005 (DRA) (Pub L 109-171, 120 Stat 4). However, the amendments will not take effect until state implementing regulations are promulgated on a non-emergency basis, and the new rules will only apply prospectively. Stats 2008, ch 379. See §6.59. See also §6.66.

A section has been added discussing nomination of a conservator of the estate, and how it interfaces with a power of attorney for financial management. See §7.11A. See also §§10.21, 11.20. A section has been added discussing nomination of a conservator of the person, and how it interfaces with an advance health care directive. See §7.64. See also §§10.21, 11.20.

A court awarded the bulk of the proceeds of a decedent's life insurance policy to his ex-wife because the decedent had neglected to change the beneficiary designation on dissolution of the marriage and the property settlement agreement had not specifically mentioned the policy. *Life Ins. Co. of N. Am. v Ortiz* (9th Cir 2008) 535 F3d 990. See §7.21.

In 2009 and 2010, qualified expenses under state-sponsored College Savings Accounts may include purchase of computer technology or equipment, including internet access. IRC §529(e)(3)(A)(iii). See §7.46.

The discussion of requests regarding resuscitative measures has been significantly expanded. See §§7.62-7.62D.

A new section has been added as §8.9A regarding the importance of obtaining information about a client's online accounts and passwords for assets for which there is no paper documentation.

The client information questionnaire in §8.10 has been revised in several places to increase references to a client's domestic partner and to elicit additional information regarding, *e.g.,* armed forces service and benefits, medical insurance, and long-term care insurance.

The probate filing fees have increased to $355 (from $350), effective July 28, 2009. Govt C §70658(a), as amended by Stats 2009, 4th Extra Sess, ch 22, §25. See §9.10.

Discussion has been added regarding the importance of documenting a client's decision not to reduce the size of a potentially taxable estate, in view of the uncertain future of the estate tax. See Alert in §10.3.

Discussion has been added regarding a client's decision whether to include a trust provision requiring that any successor trustee post a bond. See §10.16.

The provisions in Article 4 of the sample revocable trust in §11A.35 have been corrected to show that the gifts to the Settlors' grandchildren at the death of the first spouse to die will be made from the Deceased Settlor's portion of the trust estate.

The discussion of transfer of stock certificates to a trust has been expanded, and discussion of transferring treasury bonds has been added. See §12.36.

The discussion of recording a deed has been expanded to address the necessity under many local rules that a transfer tax statement claiming an exemption cite the relevant section of the Revenue and Taxation Code. See §12.53.

Revenue and Taxation Code §63.1(j) has been added, authorizing counties to impose a processing fee if a claim for a parent-child or grandparent-grandchild property tax reassessment exclusion is untimely filed after notice by the county assessor of potential eligibility for the exclusion. See §12.58. See also §3.76.

A section has been added discussing beneficiary designations on annuities. See §12.68A.

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Cutoff Dates and CEB Citation

Cutoff Dates

We completed legal editing and analysis of authorities cited in this publication as of August 12, 2009, and monitored developments through September 21, 2009.

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Introduction

I. WHY THIS BOOK? §1.1

II. WHAT IS A SMALL OR MID-SIZE ESTATE? §1.2

III. OVERVIEW OF CONTENTS §1.3

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§1.1 I. WHY THIS BOOK?

"In this world nothing is certain but death and taxes." So said Benjamin Franklin. It is the certainty of death and taxes that guarantees that estate planning will always be with us. Everyone, rich or poor, married, with a domestic partner, or unmarried, old or young, with children and without, is a possible estate planning client. Everyone, including people with few assets, for example:

- May want to make sure that their closest relatives inherit nothing from them;
- Want to make sure that specific items of sentimental value go to the people in their lives who will appreciate them;
- Worry about who will take care of their children if they die while the children are young;
- Worry about who will make their health care decisions for them if they become incapacitated and who will carry out their postmortem wishes regarding burial or cremation; and
- Worry about who will take care of paying their outstanding bills when they die.

Attorneys who specialize in estate planning know that each client's family situation, mix of assets, and estate planning goals are unique. These attorneys know the tax issues that must be considered, which assets and situations present particular problems, and which estates may be outside the scope of their expertise. For example, when a client's assets consist primarily of extremely large retirement assets, even certified experts in estate planning may refer the client to an expert in retirement benefits to help with a plan; similarly, complex business entity issues may require a consultation with an estate planner who is expert in that area.

Attorneys who do not specialize in estate planning or who want to build an estate planning practice need to know more than simply how to draft a simple will or trust or power of attorney. They need to know preliminarily whether the client has estate planning issues, whether tax issues or family issues, or problem assets, whether because of value or type, that are beyond their level of competence. Once they have screened out cases that are outside of their expertise, they need to view an estate plan as a complete set of coordinated documents. Preparing a will to provide for distribution of a house and a car while ignoring, for example, the need to fill out updated beneficiary designation forms for retirement plan benefits or life insurance and executing an advance health care directive, is not competent estate planning.

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§1.2 II. WHAT IS A SMALL OR MID-SIZE ESTATE?

We have not attempted to narrowly define a small or mid-size estate in this book. The focus, however, is primarily on estates for which gift and estate tax planning is not a foremost concern. Estate planners understand that there is no hard and fast definition of small, mid-size, and large estates. One common measure is that a large estate is one that will result in an estate tax. However, in the recent past and continuing at least until 2009, the actual value of an estate that meets this definition has been an increasing amount ($2 million in 2006). In 2010, there will be no estate tax. In 2011, the estate tax will apply only to estates of more than $1 million. Between now and 2010, most likely Congress will pass legislation changing or "permanently" fixing the size of an estate that will be subject to the estate tax.

In addition to the changing size of a taxable estate in different years, there are other factors that make it difficult to define a small or mid-size estate. For example, if an adult who is an only child has a mid-size estate now (*e.g.,* with a total value well below $1 million), but has one living parent who is in failing health and whose estate is valued at $5 million, does the estate planner treat the adult child's estate as a mid-size estate? Or, if a young person is a rising star in a law firm, earning a large salary, and has few liquid assets but has been steadily contributing to various retirement plans and soon expects to be made a partner, how long will his or her estate be a small or mid-size estate? How should the attorney categorize the estate of a business person who expects his or her start-up business to be bought for millions of dollars within the next year?

Although the definition of a mid-size estate is necessarily vague, this book is intended to prepare practitioners to address all of the common issues that arise in general estate planning and equip them to draft a moderately sophisticated estate plan.

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§1.3 III. OVERVIEW OF CONTENTS

Large estates, however defined, that have complex gift and estate tax issues, and often also involve generation-skipping transfer tax issues, require a high level of expertise. Even when these tax issues are not present, however, there may be issues, assets, and situations that are, or may create, problems for the estate planner. In chapters 2 through 6, the authors identify problem areas and provide enough detail about each of them to send a warning signal to attorneys when a client presents a difficult issue. In some cases, the attorney may accept the representation by developing sufficient expertise or associating or consulting with an estate planning attorney with expertise in the area. In other cases, the attorney should refer the client to an expert. Among the ethical obligations of an attorney that are discussed in chap 2 is knowing when to decline representation because of lack of competence.

Chapter 7 gives an overview of the estate planning documents that comprise an estate plan and addresses planning issues that should be taken into consideration.

Chapter 8 focuses on the important initial task of gathering the complete information the attorney will need when preparing the estate plan.

Chapters 9, 10, 11, and 11A present true-to-life hypothetical clients, with families and friends, each with a unique set of assets. The authors describe in detail how issues particular to each client's fact situation should be discussed with the client. The clients then make their decisions about the documents that the attorney will draft and the provisions that should be included regarding their specific assets, health care decisions, and care and custody of minors, and management and distribution of the assets that the minors will inherit.

NOTE: The authors for chapters 9, 10, 11, and 11A have different drafting techniques and use different standard documents in creating estate plans for their clients. For example, some use the California Medical Association advance health care directive kit; others use their own attorney-drafted forms. Some attorneys use the statutory form durable power of attorney in every case; others use their own attorney-drafted form in some or most cases. No attempt has been made to create standardized forms or provisions. For maximum benefit in using this book, it is recommended that the reader review the discussion of particular issues as presented in each of these chapters before deciding which approach would be most useful and which issues are relevant when preparing an estate plan for a particular client.

Chapter 12 first addresses some of the most common problems faced by the estate planning attorney once the documents have been drafted and sent to the client, such as what to do when the client fails to respond. The authors then review in detail the steps that must be taken to implement the estate plan, including:

- Preparing documents transferring assets to a revocable trust;
- Transferring title to assets in various fact situations (for example, from joint tenancy to community property with right of survivorship);
- Filling out beneficiary designation forms;
- Transfers under the California Uniform Transfers to Minors Act; and
- Drafting deeds and related documents for transfers of real property.

In each case, the book provides sample forms or sample language.

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Ethical Considerations

CEB Staff

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I. IMPORTANCE OF ETHICAL CONSIDERATIONS

§2.1 A. Constant Concern for Estate Planners

Ethical issues arise daily in an estate planning practice, especially in the estate planning attorney's relationship with the client. When family members participate, there is almost always a potential conflict of interest or unintended dual representation. The problem is compounded if the client is frail or mentally impaired, because he or she may rely on more vigorous family members and be vulnerable to any pressures they exert. When the impairment is substantial, the attorney's ability to form an attorney-client relationship may be brought into question.

The client's attorney must be aware of all the ethical considerations implicated in assisting the client in accomplishing the client's goals. The attorney must work closely with the client and sometimes also with other members of the client's family and their property. If the client is married, usually the attorney will represent both spouses as clients. The same may be true of domestic partners.

The attorney must know where to find the rules governing ethics (see §2.3) and must be conversant with the duties of loyalty (see §2.8) and confidentiality (see §§2.9-2.15), must avoid conflicts of interest (see §§2.16-2.32), and must act competently (see §§2.33-2.37). The attorney must often be prepared to address special problems associated with clients who have diminished mental capacity. See §§2.42-2.55. In addition, the attorney must comply with the requirements of Circular 230 (31 CFR pt 10; see §§2.57-2.60) and must know the rules about prohibited donative transfers (see §2.56).

An important aspect of an attorney's duty of professional responsibility is defining who is the client, the scope of the representation, the nature of the engagement, and the basis for the fees. See §§2.61-2.72.

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§2.2 B. Attorney Is More Than Scrivener

Most attorneys have encountered clients who, believing that their affairs and intentions are straightforward, want only a "simple" will and not an estate plan. These clients assume that the attorney's job should be correspondingly simple (and inexpensive). The attorney who accedes to the client's wishes and functions as a mere scrivener does so at his or her peril. For example, if the client's estate later incurs significant probate costs because the attorney failed to discuss a revocable trust with the client, the beneficiaries may sue for malpractice, claiming that the attorney should have informed the client of the options available to avoid probate. If the attorney fails to discuss powers of attorney for the client, who soon afterwards becomes incapacitated, requiring imposition of a conservatorship, the attorney may be sued for malpractice on the grounds that the attorney should have performed full-scale estate planning for the client.

The attorney should advise the client that drafting an estate plan requires preparing more than just one document. For example, a client who has a trust prepared needs a pourover will prepared in conjunction with the trust. Whether a simple will or trust is prepared, the client should also execute a power of attorney for financial management and an advance health care directive. In addition, assets such as life insurance, annuities, and employee benefits require attention. Clients with spouses or domestic partners holding title to assets as joint tenants may want to change title to community property with rights of survivorship. A single client who owns an asset with one or more persons may need advice on the best manner in which to hold title. If the client insists that the attorney not prepare a complete plan or prepare a plan that will have avoidable tax or probate costs, the attorney should document the discussion with the client of the relevant issues.

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II. RULES OF PROFESSIONAL CONDUCT

§2.3 A. Sources of Authority

The rules of professional conduct governing California attorneys stand alone. Unlike the rules in many other states, they are not the ABA Model Rules of Professional Conduct, nor are they even derived from the Model Rules, although they are partially based on the former ABA Code of Professional Responsibility. See 48 State Bar J 328 (1973).

The California rules are located in numerous places, including the California Rules of Professional Conduct (promulgated by the California Supreme Court), the Business and Professions Code, the Probate Code, the Evidence Code, the Penal Code, and the Welfare and Institutions Code. Interpretive authority is provided in case law, in formal opinions issued by the Standing Committee on Professional Responsibility and Conduct of the State Bar of California (COPRAC), and in formal and informal opinions of county bar associations.

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B. Consequences of Violating Rules

§2.4 1. Discipline by State Bar

The most obvious consequence of violating an ethical rule, besides the breach to the client, is discipline by the California State Bar, which imposes sanctions ranging from probation to suspension to disbarment. Disciplinary proceedings arise most commonly from commingling client funds with the attorney's funds and failure to perform work for which the attorney was engaged. An attorney who participates in certain plans that market legal services, such as a "trust mill," and does not meet with clients or supervise nonattorneys, may be violating Cal Rules of Prof Cond 1-300 (unauthorized practice of law), 1-320 (financial arrangements with nonlawyers), 1-400 (advertising and solicitation), 3-110 (failing to act competently), 3-310 (avoiding the representation of adverse interests), and 3-500 (communication).

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§2.5 2. Civil Liability for Malpractice

Technically, there is no independent cause of action for the breach of a disciplinary rule. See *Wilhelm v Pray, Price, Williams & Russell* (1986) 186 CA3d 1324, 1333 n5, 231 CR 355. See also Cal Rules of Prof Cond 1-100(A) (rules are not intended to create new civil causes of action). Nevertheless, there is overlap between attorney conduct that is subject to ethical regulation and attorney conduct that is subject to civil claims, and there is strong malpractice liability exposure associated with violating the rules of professional conduct. In general, however, the ethical rules state an attorney's duties to the public at large. Enforcement is brought by the State Bar, whether or not there is an additional damage claim that could be brought by an individual.

In a civil action for an attorney's breach of fiduciary duty to a client, the applicable rule of professional conduct does not establish an independent cause of action, but it does provide the standard by which the attorney's duty is measured. Testimony regarding the rules is therefore admissible and may be the basis for jury instructions. *Mirabito v Liccardo* (1992) 4 CA4th 41, 5 CR2d 571. A violation of the ethical rules may be evidence of a breach of fiduciary duties and it is often the most valuable tool a malpractice plaintiff's attorney has, first to force settlement, and ultimately to impose liability at the trial level.

PRACTICE TIP: Compliance with ethical rules, however, does not provide an attorney with a defense against a malpractice claim. For example, the Official Discussion to Rule 3-310 (conflicts of interest) states: "There are some matters in which the conflicts are such that written consent may not suffice for nondisciplinary purposes."

NOTE: For a discussion of the interplay between the attorney's ethical duty and liability for malpractice, see *Day v Rosenthal* (1985) 170 CA3d 1125, 217 CR 89. The defendant attorney in *Day* was found to have violated the Rules of Professional Conduct and was ordered to pay his former clients over $26 million in damages, including $1 million in punitive damages. The court stated: "An attorney's duty, the breach of which amounts to negligence, is not limited to his failure to use the *skill* required of lawyers. Rather, it is a wider obligation to exercise due care to protect a client's best interests in all ethical ways and in all circumstances." 170 CA3d at 1147.

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§2.6 3. Invalidating Client's Estate Plan

An ethical breach by an estate planning attorney can result in the unraveling of the client's estate plan, as illustrated in *Haynes v First Nat'l State Bank* (NJ 1981) 432 A2d 890. In *Haynes,* the attorney prepared an estate plan for the client's mother. Under the plan, the mother essentially disinherited her other child, leaving her entire estate to the child who was the attorney's client. After the mother's death, the New Jersey Supreme Court set aside the estate plan on the grounds of undue influence, partly because the mother had not been advised of the conflict of interest inherent in the attorney's representation of both the daughter and the mother.

PRACTICE TIP: The estate planning attorney does well to keep the *Haynes* decision in mind as both an incentive to watch for such conflicts and as a way of explaining to the client in a multiple-representation situation why written explanations and waivers are necessary. They are for the client's protection as well as the attorney's.

If the lawyer ignores or overlooks the rules prohibiting donative transfers to "disqualified" persons under Prob C §§21350-21350.5, the lawyer may find that the revocable trust and related estate planning documents (including the transfer documents themselves) are void as invalid transfers. If the lawyer drafts an instrument making a donative transfer to himself or herself or to another "disqualified person," or has acted under a disqualified person's instructions, the transfer may be invalidated. See §2.56.

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§2.7 III. ATTORNEY'S DUTIES

The attorney owes significant duties to the client in carrying out his or her responsibilities. Although the facts of a particular case may make the application of, and compliance with, any one of these duties a challenging proposition, some duties are likely to cause trouble more often than others. The rules most commonly of concern to the estate planning attorney are:

- The duty of loyalty (see §2.8);
- The duty to maintain the client's confidences (Bus & P C §6068(e); see §§2.9-2.15);
- The duty to avoid both actual and potential conflicts of interest (Cal Rules of Prof Cond 3-310; see §§2.16-2.32); and
- The duty to perform services competently and diligently (Cal Rules of Prof Cond 3-110; see §§2.33-2.37).

Other ethical duties include the duty to communicate with the client (Cal Rules of Prof Cond 3-500); not to participate in an organization or program furnishing, recommending, or paying for legal services that allows a third party to interfere with the lawyer's independent judgment (Cal Rules of Prof Cond 1-600(A)); and not to charge unconscionable fees (Cal Rules of Prof Cond 4-200(A)).

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§2.8 A. Duty of Loyalty

The California Supreme Court has stated that an attorney has a duty of undivided loyalty to the client. This duty exists to avoid undermining public confidence in the legal profession and the judicial process. The duty is fiduciary in nature and binds the attorney to the highest legal fidelity. *People ex rel Dep't of Corps. v SpeeDee Oil Change Sys.* (1999) 20 C4th 1135, 1146, 86 CR2d 816; *Flatt v Superior Court (Daniel)* (1994) 9 C4th 275, 282, 36 CR2d 537.

Although the duty of loyalty is a primary duty of the attorney, neither the State Bar Act nor the Rules of Professional Conduct explicitly refer to it. Rather, these authorities focus on corollaries to the duty of loyalty, *i.e.,* the duties to keep client confidences and not to represent adverse interests. In its Comment to Model Rules of Prof Cond 1.7, the American Bar Association refers to loyalty as an essential element of the lawyer's relationship to a client, discussing it in the context of avoiding conflicts of interest.

NOTE: Because the nature of an attorney's duty of loyalty is not specifically defined, it is not surprising that attorneys are often at a loss in dealing with a mentally impaired client, particularly when that client's instructions are not "normal" or "rational."

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Source: Estate Planning/Complete Plans for Small and Mid-Size Estates/2 Ethical Considerations/ B. Duty of Confidentiality/§2.9 1. Duty to Maintain Client Confidences

B. Duty of Confidentiality

§2.9 1. Duty to Maintain Client Confidences

One of the cornerstones of the attorney-client relationship is the attorney's duty to maintain client confidences. The California rule is found in Bus & P C §6068(e), which provides that it is the duty of an attorney to "maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client." See also California State Bar Formal Opinion No. 87-93.

NOTE: The California Rules of Professional Conduct do not directly deal with the duty to maintain confidences.

Whatever the attorney has seen or heard during the course of a relationship with the client may be a client secret protected by this rule. The scope of the confidentiality rule is much broader than that of the Evidence Code attorney-client privilege. In other words, it is not necessary that the secret be a protected communication as defined in Evid C §952, which governs confidential communications between clients and attorneys. Because the purpose of the ethical confidentiality rule is to encourage complete candor with the attorney and to ensure that every aspect of the attorney-client relationship will further the client's interests, even nonverbal "communications" with the attorney are covered by the duty of confidentiality. If the information would be embarrassing or detrimental to the client if divulged by the attorney to a third party, it is a protected secret. California State Bar Formal Opinion No. 89-112.

Although there are exceptions to the confidentiality rule of Evid C §952 (see, *e.g.,* Evid C §§956, 956.5, 958), there are no such exceptions to the ethical rule of Bus & P C §6068(e). The "absolute" nature of the Bus & P C §6068(e) rule of confidentiality has been reaffirmed in various ethics opinions and other forums as if the principles behind the various Evidence Code exceptions were irrelevant. If the privilege is indeed "absolute," the attorney is placed in the untenable position of being permitted (if not required) to disclose certain confidential information under the Evidence Code, but prohibited from disclosing that same information under the ethical rule of Bus & P C §6068(e). There is no guidance for the estate planning attorney caught in the middle. For a discussion of this dilemma, see House & Ross, Guide to the California Rules of Professional Conduct for Estate Planning, Trust and Probate Counsel §§5.1.1-5.1.2 (State Bar of California 2008).

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Source: Estate Planning/Complete Plans for Small and Mid-Size Estates/2 Ethical Considerations/§2.10 2. Some Typical Problem Situations

§2.10 2. Some Typical Problem Situations

In the estate planning context, confidentiality can be particularly problematic, *e.g.,* when:

- The representation entails the use of one or more agents (*e.g.,* accountant, life insurance agent, appraiser);
- The attorney represents multiple clients, either jointly or separately;
- The attorney has represented a couple jointly during their marriage, their marriage is dissolved, and both former spouses wish to continue using the attorney separately for estate planning purposes;
- The attorney is approached to represent the fiduciary (nominated trustee or agent under a power of attorney) of an existing client when the client appears to have lost some mental capacity; and
- An entire family is involved in meetings and other communications, and the client's identity may be ambiguous.

These examples demonstrate that although the duty to keep client confidences seems clear, it may be difficult to apply when a client is relying on a third party for help, when a third party fiduciary is involved, or when the client appears to have lost some mental capacity.

Technically, the client should give written authorization before the attorney discloses any confidential information to anyone. In practice, however, this is often not possible. Note that Bus & P C §6068(e) differs from ABA Model Rules of Prof Cond 1.6. The ABA rule takes a more practical approach and, unlike the California statute, explicitly recognizes that there will be "disclosures that are impliedly authorized in order to carry out the representation." ABA Model Rules of Prof Cond 1.6(a).

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3. Third Parties

§2.11 a. Agents

Disclosure of confidential information to agents assisting the attorney in rendering estate planning services is often essential to performing the services. It is not expected that the attorney will obtain the client's written consent in every instance (*e.g*., for disclosure to the attorney's or client's office staff, or the client's accountant or life insurance agent), but when the services require the use of outside agents such as appraisers or other experts, the attorney should always obtain written authorization from the client.

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Source: Estate Planning/Complete Plans for Small and Mid-Size Estates/2 Ethical Considerations/§2.12 b. Family Members

§2.12 b. Family Members

Confidentiality issues may arise when the client relies on a child or other close relative for assistance in the estate planning process, which may range from simply accompanying the client to the attorney's office, to gathering information needed for the attorney, to being involved in the actual estate planning process itself. In other cases, the issues arise after the estate plan is complete and the client instructs the attorney, for example, "to work freely with my daughter" or "to let my son know what is going on."

The attorney should be sure that the client knows the confidentiality ramifications of these instructions. The attorney should determine exactly what role the client intends the child or other person to play by conducting a frank discussion with the client. For example, does the client want the attorney to inform the child whenever any change is made to the plan and send a copy of the change? Regardless of what the client decides, the extent to which the attorney may disclose information should be documented and signed by the client.

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4. Multiple Representation

§2.13 a. Examples of When Issue Arises

The estate planning attorney is often called on to represent multiple parties in the estate planning context. For couples, the attorney usually represents both spouses or partners. In family situations, an attorney often represents members of multiple generations in their estate planning as the years go by. The first client may be the parent or the child interested in estate planning. Then, several years later, the first client directs his or her child or parent to the attorney, also for estate planning. In all of these cases, the duty to maintain confidences and the duty to avoid actual and potential conflicts of interest can trap the unwary attorney into serious ethical violations.

When the attorney represents multiple parties, the following questions arise most often:

- If the attorney represents a couple (*i.e.,* husband and wife, domestic partners, other couple), is there any confidentiality of information relating to the representation as between the two of them?
- If the attorney represents a couple, and if one spouse or partner reveals information to the attorney with the direction that the attorney not reveal it to the other spouse or partner, what should the attorney do?
- If the attorney represents multiple family members separately in their estate plans, but there is a shared desire to coordinate the plans, what confidentiality rules govern?

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§2.14 b. Client's Decision Should Be Documented

In the first two examples in §2.13, there can be no confidentiality with regard to information needed to properly represent the other party because the estate planning attorney who is representing two spouses or partners jointly cannot perform the services competently without a free exchange of information. Consequently, the duty to maintain confidentiality irreconcilably conflicts with the duty to perform competent services and the duty of loyalty to both clients. The clients must decide which duty is more important. If confidentiality prevails in a client's mind, multiple representation is impossible. This informed, conscious decision by the client must be documented in writing and signed by the client.

If the attorney does not address the confidentiality issue in the engagement letter when the multiple representation is undertaken, does not put the clients on notice that there can be no confidentiality between them, and does not have them waive the usual confidentiality rules, the attorney will be faced with an impossible situation if one of the clients expects or demands that information be withheld. To avoid this situation, the attorney who represents two clients in their estate plan must always address this subject in writing, either in a separate document or in the engagement letter. For sample language, see §§2.29-2.30.

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§2.15 5. IRS Demands for Information

Information obtained by the attorney during the estate planning process is often of interest to the Internal Revenue Service in the event of an audit of the client's tax returns. This has been especially true in recent years regarding audits of family limited partnership transactions, in which the IRS has regularly demanded to see all of the attorneys' correspondence relating to the planning, creation, funding, and administration of these entities. That demand has taken the form of letters, items on checklists, and even a summons by the IRS to the estate planning attorneys. See *Segerstrom v U.S.* (ND Cal 2001) 2001-1 USTC ¶50,315, 87 AFTR2d 1153 (IRS summons quashed based on claim of attorney-client privilege). Documents relating to tax advice by accountants who are federally authorized tax practitioners also may be privileged under IRC §7525.

Faced with a demand from the IRS regarding a client, the lawyer must either obtain a waiver by the client if the lawyer and client conclude that it will actually further the client's case to disclose the information, or refuse to make the disclosure based on both ethical (Bus & P C §6068(e)) and evidentiary privilege (Evid C §952) grounds. However, estate planning attorneys should be aware that communications relating to tax return preparation are not privileged. *U.S. v Lawless* (7th Cir 1983) 709 F2d 485; *U.S. v KPMG LLP* (D DC 2002) 237 F Supp 2d 35.

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Source: Estate Planning/Complete Plans for Small and Mid-Size Estates/2 Ethical Considerations/§2.16 C. Duty to Avoid Conflicts of Interest

§2.16 C. Duty to Avoid Conflicts of Interest

Along with the duty of confidentiality and the duty to act competently, the duty to avoid conflicts of interest is the third pillar of the attorney-client relationship. California Rules of Professional Conduct 3-310 regulates, but does not bar, the representation of adverse interests. Under Cal Rules of Prof Cond 3-310(E), an attorney may not accept employment adverse to a client or former client if the attorney has confidential information material to the employment, except with the informed written consent of the client or former client. Informed written consent is also required if the attorney concurrently represents (or intends to represent) clients whose interests conflict or potentially conflict. Cal Rules of Prof Cond 3-310(C).

Rule 3-310 reads in part:

> (A) For purposes of this rule:
> (1) "Disclosure" means informing the client or former client of the relevant circumstances and of the actual and reasonably foreseeable adverse consequences to the client or former client;
> (2) "Informed written consent" means the client's or former client's written agreement to the representation following written disclosure.
> (B) A member shall not accept or continue representation of a client without providing written disclosure to the client where:
> (1) The member has a legal, business, financial, professional, or personal relationship with a party or witness in the same matter; or
> (2) The member knows or reasonably should know that:
> (a) the member previously had a legal, business, financial, professional, or personal relationship with a party or witness in the same matter; and
> (b) the previous relationship would substantially affect the member's representation; or
> (3) The member has or had a legal, business, financial, professional, or personal relationship with another person or entity the member knows or reasonably should know would be affected substantially by resolution of the matter; or
> (4) The member has or had a legal, business, financial, or professional interest in the subject matter of the representation.
> (C) A member shall not, without the informed written consent of each client:
> (1) Accept representation of more than one client in a matter in which the interest of the clients potentially conflict; or
> (2) Accept or continue representation of more than one client in a matter in which the interests of the clients actually conflict.
> (3) Represent a client in a matter and at the same time in a separate matter accept as a client a person or entity whose interest in the first matter is adverse to the client in the first matter.
> (D)… [Settlement of claims]
> (E) A member shall not without the informed written consent of the client or former client accept employment adverse to a client or former client where, by reason of the representation of the client or former client, the member has obtained confidential information material to the employment.

For a comprehensive discussion of conflicts of interest in estate planning situations, see House & Ross, Guide to the California Rules of Professional Conduct for Estate Planning, Trust and Probate Counsel (2008).

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§2.17 1. Difficulty of Avoiding Conflicts

Applying Cal Rules of Prof Cond 3-310 can be very difficult, because the attorney cannot always foresee problems at the outset of the representation. In estate planning in particular, representation often takes place over many years and involves family issues that change over time. Consequently, the attorney must always be aware of both the duty of confidentiality and the duty to avoid actual and potential conflicts of interest, and must be especially sensitized to look for the areas in which it is easy to run afoul of the rules in drafting estate planning documents.

Conflicting interests may interfere with the obligation of undivided loyalty that prohibits the attorney from subordinating the interest of one client to that of another. The attorney should avoid even the appearance of impropriety, which can be as damaging as actual misconduct. Multiple representations in the estate planning context can easily lead to the appearance of impropriety, especially if everyone involved was not fully informed of the potential problems at the outset.

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2. Examples of Conflict Situations

§2.18 a. Concurrently Representing Multiple Parties

In the estate planning context, concurrent representation of multiple parties typically occurs when both parties in a married or unmarried couple, or a parent and an adult child, become clients (possibly without knowing that the other one is a client). The Official Discussion to Cal Rules of Prof Cond 3-310 states that Rule 3-310(C)(1)-(2) apply to all types of legal employment, including "the concurrent representation of multiple parties in litigation or in a single transaction or in some other common enterprise or legal relationship."

When two or more clients use the same attorney's services in a single representation, the attorney usually represents them as "joint" clients and every action taken in the course of the representation is done for both of them. Joint representation rests on the premise that, absent contrary evidence, no actual adversity exists between the parties. It implies that all information received by the attorney on the subject of the representation (*i.e.,* their joint estate plan) will be shared between the clients. The attorney's duty not to disclose confidential communications could conflict, absent a waiver, with the attorney's duty to represent each client's interests fully.

Although the parties may prefer employing a single attorney for reasons of convenience or economy, the attorney must nevertheless disclose the potential adverse aspects of the joint representation and obtain each party's informed written consent (commonly known as a "conflicts waiver"). Cal Rules of Prof Cond 3-310(B)-(C). The conflicts waiver signed by the clients should clearly disclose the fact that there can be no privileged communications between the parties regarding their estate planning. For sample conflicts waiver forms, see §§2.29-2.30.

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Source: Estate Planning/Complete Plans for Small and Mid-Size Estates/2 Ethical Considerations/§2.19 (1) Spouses or Domestic Partners

§2.19 (1) Spouses or Domestic Partners

The most common example of joint representation in estate planning is that of a husband and wife, or two domestic partners, who wish to plan their estates to benefit each other and their children. Because of the inherent conflicts in representing both spouses or domestic partners, an attorney representing both must obtain written consent to dual representation. The Official Discussion to Cal Rules of Prof Cond 3-310 specifically includes the preparation of joint or reciprocal wills for husband and wife as an example of multiple representation to which Rule 3-310(C)(1)-(2) applies.

An attorney who drafts estate plans for spouses or for California-registered domestic partners, who have the same rights and responsibilities as spouses under California law (see Fam C §§297.5, 299.3), might face potential or actual conflicts of interest in the following circumstances:

- One spouse or domestic partner tells the attorney confidentially about substantial property acquired before entry into marriage or domestic partnership about which the other is unaware.
- The spouses or partners differ over the characterization of property as separate or community.
- Each spouse or partner prefers a different person for the guardian of their children.
- The spouses or partners differ in their views of their own and the other's abilities to invest funds and manage a trust.
- One spouse or partner has children by a previous marriage or domestic partnership.
- One spouse or partner, while married or in the partnership, has a child with a third person and wants to provide for that child without informing spouse or partner.
- One spouse or partner has a substantially larger estate than the other.
- One or both spouses or partners have substantial amounts of separate property or substantial estates that each wishes to give to persons other than the survivor.

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Source: Estate Planning/Complete Plans for Small and Mid-Size Estates/2 Ethical Considerations/§2.20 (2) Other Couples as Clients

§2.20 (2) Other Couples as Clients

The attorney representing unmarried couples or unregistered domestic partners may face some of the situations described in §2.19, and may also face potential or actual conflicts of interest in the following situations:

- The couple is considering placing an asset purchased by one party into some form of common ownership.
- The couple has taken title to property in joint tenancy without understanding the legal implications of this action.

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Source: Estate Planning/Complete Plans for Small and Mid-Size Estates/2 Ethical Considerations/§2.21 b. Individual Clients

§2.21 b. Individual Clients

The potential for a conflict of interest exists even absent joint representation. Conflicts of interest commonly arise in the following situations:

- An attorney names a bank as the executor of a client's will and successor trustee of the client's trust, and the bank has a policy of employing the attorney who drafted the documents to represent the bank in the probate of the client's estate and administration of the trust.
- An attorney drafts an instrument in which one of several beneficiaries is also a fiduciary or "disqualified person" (Prob C §§21350-21350.5), or the attorney is directed to act by a disqualified person. See §2.56.
- An attorney who represents a business with several owners is asked to do estate planning (including advising on stock dispositions, retirement plans, and buy-outs) for one of them.

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§2.22 c. Representing Client With Interests Adverse to Former Client

Informed written consent by a client or former client is required before an attorney can accept adverse employment if the attorney has obtained confidential information "material to the employment" during the representation of the client or former client. Cal Rules of Prof Cond 3-310(E).

The Official Discussion to Cal Rules of Prof Cond 3-310 makes clear that Rule 3-310(B), requiring disclosure of adverse representation, is not intended to require either the disclosure of a conflicting new engagement to a former client or the consent of the former client to the engagement. Instead, it says that such disclosure and consent are required only if Cal Rules of Prof Cond 3-310(E) applies.

For example, disclosure and consent would be required if an attorney prepares an estate plan for spouses or registered domestic partners and, at a later date, is asked by one spouse or partner to represent him or her in a dissolution proceeding or in preparing a *Marvin* agreement without consent of the other spouse or partner in a case involving that spouse's or partner's paramour (see *Marvin v Marvin* (1976) 18 C3d 660, 134 CR 815). See LA Bar Ass'n Informal Ethical Opinion No. 1958-5; Fam C §297.5. See also LA Bar Ass'n Formal Ethical Opinion No. 448 (Dec. 21, 1987), concluding that an attorney who had drafted wills and living trusts for a husband and wife could not later represent the husband in drafting a *Marvin* agreement with his paramour without his wife's consent. Similarly, the attorney may not be able to represent one of two clients who later wishes, without the knowledge of the other client, to alter the estate plan to the other's detriment.

Disclosure and consent would also be required if an attorney who has previously prepared an estate plan for a parent in which the parent has disinherited an adult child is later asked by the adult child to prepare the child's estate plan. The attorney's duty to the child would require disclosure of the disinheritance to the child, but the attorney's duty to the parent would prohibit this disclosure. In this case, the attorney probably should not accept representation of the child.

The rule against representing clients with adverse interests would also apply in the elder law context, *e.g.,* when a former client becomes incapacitated and a family member seeks the attorney's advice on how to handle the elder's affairs.

NOTE: Under ABA Model Rules of Prof Cond 1.9, a consent is required from a former client when a new client's interests are *materially* adverse to those of the former client. This rule is similar to Rule 3-310(E), except that Rule 1.9 is not limited to situations in which the attorney has received confidential information from the former client.

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§2.23 3. Consequences of Representing Parties With Conflicting Interests

An attorney who represents parties with conflicting interests may be subject to professional discipline, may be liable for malpractice by causing harm to the client or a beneficiary, and may lose fees. See *Galbraith v State Bar* (1933) 218 C 329, 23 P2d 291 (professional discipline); *Anderson v Eaton* (1930) 211 C 113, 293 P 788 (nonconsensual, conflicting representation by attorney may constitute defense to nonpayment of legal fees); *Jeffry v Pounds* (1977) 67 CA3d 6, 136 CR 373 (defense to claim for fees); *Ishmael v Millington* (1966) 241 CA2d 520, 50 CR 592 (malpractice liability).

When accused by a client of not fully representing the client's interest because of a conflict of interest, an attorney cannot rely on "honesty of purpose, intention and motive" to defend his or her actions. *Hammett v McIntyre* (1952) 114 CA2d 148, 155, 249 P2d 885. The attorney is liable even for an error committed in good faith.

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4. Avoiding Conflicts of Interest

§2.24 a. Identify Conflict

A routine check for conflicts of interest should be part of every estate planner's initial office procedures. Many law office management computer programs now automate these procedures.

A mere diversity of opinions between the clients does not create conflicting interests, but counsel should insist on adequate disclosure and consent. Otherwise, the attorney is not competently representing the person from whom disclosure is withheld.

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§2.25 b. Distinguish Potential and Actual Conflict

Without an informed written waiver by both clients, an attorney may not represent multiple clients in a matter in which the interests of the clients *potentially* conflict. Cal Rules of Prof Cond 3-310(C)(1).

The Official Discussion to Cal Rules of Prof Cond 3-310 states that if a potential conflict becomes actual, the lawyer must obtain further informed written consent under Cal Rules of Prof Cond 3-310(C)(2), which forbids new or continued representation of multiple clients whose interests *actually* conflict. It is unclear at what point a conflict progresses from potential to actual, triggering the requirement for additional written consent. Is a conflict actual only when the clients are overtly in dispute? Or does it become actual if the results of a proposed action immediately and clearly benefit one client at the expense of the other?

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§2.26 c. Obtain Informed Written Consent

An attorney who foresees a possible conflict of interest in representing one or more clients must obtain each affected client's informed written consent to the representation (commonly referred to as "conflicts waivers") before providing any services. Cal Rules of Prof Cond 3-310(C). They can be obtained by letter or as part of the fee agreement for legal services. For sample conflicts waivers, see §§2.29-2.30. For provisions intended to be part of a fee agreement, see Fee Agreement Forms Manual §§1.34-1.35 (2d ed Cal CEB 2007).

In particular, in all cases of joint representation, *e.g.,* when representing couples as estate planning clients, the attorney must disclose the potential adverse aspects of the representation and obtain consent from each client. The attorney is being asked to represent each of them, but each of them is interested in the attorney's representation of the other. See §§2.18, 2.31.

PRACTICE TIP: Many conflict situations cannot be resolved by consent. If the clients' relationship is such that consent by one may be seen as unduly influenced by the other, or the situation is so complex that any consent might not be informed, the attorney should simply tell the clients to retain separate counsel.

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§2.27 (1) Make Required Disclosures

In obtaining the clients' consents, the attorney's hardest task is ensuring that the consents are "informed." Written disclosure by the attorney is required before a client can give informed written consent. Cal Rules of Prof Cond 3-310(A)(2). To meet the disclosure standard, the attorney should explain the potential for conflicts in at least the following areas:

- Ownership and characterization of property;
- How property should be held;
- How property should be disposed of; and
- Who should serve in fiduciary capacities (*e.g.,* executor, trustee, guardian).

The scope of required disclosure is limited to "the relevant circumstances and… the actual and reasonably foreseeable adverse consequences to the client or former client." Cal Rules of Prof Cond 3-310(A)(1).

Informing clients of the risks of joint representation is not easy. Because clients often deny that a conflict exists or is possible, the attorney's delicate task is to make them aware of potential conflicts without exacerbating existing friction or alienating them. A useful tactic may be to describe hypothetical conflicts of interest, recent newspaper articles on actual problems between jointly represented clients, or examples from the attorney's own practice.

It is a mistake not to discuss the issues of potential conflict and confidentiality with the clients in person and before presenting them with the written waiver and consent. Clients who have had an opportunity to discuss the subject with the attorney face to face, or at least over the telephone, are seldom upset by the waiver and consent document itself. Without this preparation, however, the clients are often, at best, confused, and at worst, offended.

WARNING: Full disclosure includes informing the clients that the attorney may have to withdraw from representing either client if an actual conflict arises, resulting in wasted time and fees. Full disclosure also means informing clients of their right to obtain independent counsel.

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Source: Estate Planning/Complete Plans for Small and Mid-Size Estates/2 Ethical Considerations/§2.28 (2) Waiver of Confidentiality in Joint Representation

§2.28 (2) Waiver of Confidentiality in Joint Representation

Before obtaining joint clients' consent to representation, the attorney should discuss with them the provisions of Evid C §962. See Official Discussion to Cal Rules of Prof Conduct 3-310. This statute makes clear that in a civil proceeding between two former joint clients of an attorney, any communication made from one client to the attorney during the representation is not privileged. The clients should understand that if they each employ separate counsel, their communications to their respective attorneys will be fully protected from disclosure in any later civil proceeding.

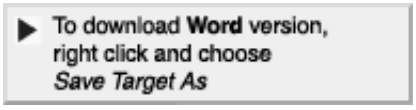
Most attorneys ask both clients to consent to complete disclosure to the other of all communications between each client and the attorney, even if the information is obtained in private conferences with one client. See discussion of this topic in House & Ross, Guide to the California Rules of Professional Conduct for Estate Planning, Trust and Probate Counsel (2008). See §§2.29-2.30 for sample forms.

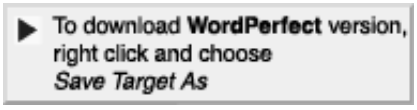
NOTE: Some attorneys representing joint clients ask their clients to consent to provisions that allow one of the clients to instruct the attorney to keep specific communications confidential and not to disclose the communications to the other client. See, *e.g.,* the sample form in Fee Agreement Forms Manual §1.34 (2d ed Cal CEB 2007). However, this arrangement produces an ethical dilemma for the attorney if the communication in question adversely affects the client from whom the communication is to be kept confidential. The attorney should not agree to joint representation on this basis.

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Source: Estate Planning/Complete Plans for Small and Mid-Size Estates/2 Ethical Considerations/§2.29 (3) Form: Consent to Dual Representation--Short Form

§2.29 (3) Form: Consent to Dual Representation—Short Form





2.29-1 Consent to dual representation—short form

Consent to Dual Representation

We the undersigned _ _[*husband and wife/spouses/domestic partners*]_ _ consent to _ _[*name of attorney*]_ _ representing both of us in drafting our revocable trusts and otherwise planning our estates.

We know and understand that representation by a single attorney will have the following consequences compared with each of us having a separate attorney:

1. *Limited Confidentiality*. If each of us were represented by a separate attorney, each would be able to tell the attorney confidential information about _ _[*his/her/his or her*]_ _ estate plan and be certain that the attorney could not disclose the information to the other of us. In contrast, if we are both represented by a single attorney, anything that either of us tells the attorney will be disclosed to the other if the attorney believes that a failure to disclose would violate _ _[*his/her*]_ _ duty to protect the other.

2. *Lack of Separate Advocate*. If each of us had a separate attorney, each would have an attorney who would "take sides" and argue on _ _[*his/her/his or her*]_ _ behalf to maximize such things as the ability to own or control property in comparison to the other of us.

3. *Less Protection From Possible Overreaching by the Other*. In the nature of things, an attorney representing both parties is likely to view his or her task as attempting to accomplish the stated common goals of the representation, and may be less likely than an attorney representing a single party to warn of possible improper action by the other party. For example, if each of us proposes to give the other a power of attorney, an attorney representing both parties may be more inclined to assume that the parties are aware of the obvious risks of giving powers of attorney, rather than explicitly pointing out that the other of us might use the power of attorney to mortgage the house and spend the funds. Similarly, if each of us proposes to leave all of his or her estate to the other, an attorney representing both parties may be less likely to suggest ways in which the first of us to die could restrict what the survivor could do with the inherited property.

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _

__[*Signature*]__
_ _[*Typed name*]_ _

Comment: This form of consent to dual representation is appropriate to use at the initial interview or otherwise early in the representation. For a form to use later in the process when the attorney has acquired more information about the clients, see §2.30.

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Source: Estate Planning/Complete Plans for Small and Mid-Size Estates/2 Ethical Considerations/§2.30 (4) Form: Consent to Dual Representation--Long Form

§2.30 (4) Form: Consent to Dual Representation—Long Form

▶ To download **Word** version, right click and choose *Save Target As*

▶ To download **WordPerfect** version, right click and choose *Save Target As*

2.30-1 Consent to dual representation—long form

Consent to Dual Representation

It is customary for _ _[*a husband and wife/spouses or domestic partners*]_ _ to retain the same attorney to assist them in drafting their revocable trust(s) and otherwise planning their estates. However, it is important that you understand that, because I would be representing both of you, each of you would be my client. As a result, matters that one of you might discuss with me would not be protected by the attorney-client privilege from disclosure to the other. The Rules of Professional Conduct of the State Bar of California prohibit me from agreeing with either of you to withhold information from the other that I would otherwise have had a duty to disclose. Also, each of you is entitled to full privacy and confidentiality from the other as respects the contents of your trust and other estate planning documents. To the extent that I represent both of you, and our discussions are carried on in the presence of both of you, each is waiving that right of privacy and confidentiality.

In addition, under the Rules of Professional Conduct, I am required to disclose to you any actual or potential conflicts of interest that may arise from my representing both of your interests, and to obtain your written consent to representing both of you despite such conflicts. If the two of you have a difference of opinion about your proposed revocable trusts or your estate plan, I can point out the pros and cons of such different opinions. The Rules of Professional Conduct prohibit me from advocating one of your positions over the other.

***Privilege.* Anything either of you discusses with me is privileged from disclosure to third parties in a litigated matter. If I represent both of you, if a later dispute arises between the two of you, what I learned during my representation of you is not privileged vis-à-vis that dispute.**

***Conflicts Regarding Community and Separate Property.* At present there is a potential conflict regarding the characterization of your real and other property as separate or community property.**

[*Add one of the following alternatives*]

[*Alternative 1: Property will retain its character as separate or community; no specification*]

Your revocable trust documents will not specifically identify separate property and community property and will provide that separate property and community property will retain their character as such, *i.e.,* the characterization of your property as separate or community will not change as a result of the estate planning that I perform and the documents that I draft for you. I am accepting the facts regarding your property as represented by you, and I will not seek to trace the property to determine or change its characterization.

[*Alternative 2: Property to be identified as separate or community*]

After our discussion at our office conference, I am accepting the facts regarding your property as represented by you, and I am accepting our mutual conclusions based on those facts and discussion regarding the characterization of your property as separate or community. The property will be thus identified as separate or community in your estate planning documents, and I will not seek to trace the property to determine or change such characterization.

[*Continue*]

If you were each represented by a separate attorney who advocated your position alone, it is possible that the characterization of your property would be different from that as presently understood, and that issues would

arise in determining and protecting the separate or community property nature of your property and in asserting and pursuing claims that you may have against each other with respect to that property.

Survivor as Trustee of Bypass Trust **_ _[*and QTIP Trust*]_ _. The Bypass Trust _ _[*and QTIP Trust*]_ _ _ _[*provides/provide*]_ _ benefits for the surviving _ _[*spouse/partner*]_ _. Because the surviving _ _[*spouse/partner*]_ _ is the trustee of those trusts, _ _[*he/she/he or she*]_ _ could deplete them under the "health, education, maintenance, or support" standard and leave few, if any, assets available for the deceased _ _[*spouse's/partner's*]_ _ other beneficiaries.**

[*Add when QTIP Trust is used*]

Although the foregoing standard is common for a bypass trust, it is less common, although not unusual, for a QTIP trust.

[*Continue*]

To some degree, each of you is thus trusting the other not to take undue advantage of _ _[*his/her/his or her*]_ _ position as trustee of _ _[*that trust/those trusts*]_ _.

***Withdrawal as Attorney*. Although it is unlikely to happen, if conflicts do arise between the two of you of such nature that it is important in my judgment to perform my obligation to each of you in accordance with this letter, I may determine that I must withdraw as your joint attorney, and I will advise one or both of you to obtain independent counsel.**

Endorsement. **Please read the following endorsement. If the terms are acceptable to you, please sign below.**

ENDORSEMENT

We have read the above statement and understand its contents. We consent to having _ _[*name of attorney*]_ _ represent both of us on the terms and conditions set forth above. We understand the discussion of conflicts of interest in the letter and waive any potential conflict of interest. We agree that there shall be no confidential information between the two of us with respect to information either of us provides to _ _[*name of attorney*]_ _.

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _

__[*Signature*]__
_ _[*Typed name*]_ _

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§2.31 d. Treat Each Party in a Joint Representation as Client

The attorney should treat each party in a joint representation as a client. Although many couples prefer to have one person deal with the attorney, with the other individual meeting with the attorney only to execute documents, this practice is extremely unwise. The attorney should meet with both parties at all stages in the estate planning process; meeting with each party individually may also be necessary at some point. The attorney should be particularly wary when one client appears to dominate the other. For an illustration of how an estate plan can be voided when one client dominates the other, see *Estate of Madu* (1970) 11 CA3d 409, 89 CR 787.

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§2.32 e. Withdraw From Representation

When there is a conflict, the attorney must withdraw from representation unless he or she obtains the written consent of all concerned parties. Cal Rules of Prof Cond 3-310. Withdrawal may be required even if it will have an adverse economic effect on innocent clients. The court may order withdrawal if the attorney cannot disengage from the representation. Clearly, the client's best interest requires that an attorney who discerns an irreconcilable conflict should withdraw before investing too much time in the matter and before either client suffers too much detriment.

An attorney who must withdraw should assist the clients in finding other competent counsel. The attorney should not direct the client to another person in the same firm or select the new counsel. At most, the attorney should identify two or three competent attorneys and suggest that the clients interview all of them before deciding on one. When the need for withdrawal is the result of a serious adversarial turn in the clients' relationship (*e.g.*, marital dissolution), the attorney should be wary of even making a referral for fear that the act of referring either client constitutes a breach of the duty of loyalty to the other. See *Flatt v Superior Court (Daniel)* (1994) 9 C4th 275, 36 CR2d 537.

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Source: Estate Planning/Complete Plans for Small and Mid-Size Estates/2 Ethical Considerations/§2.33 D. Duty to Act Competently

§2.33 D. Duty to Act Competently

Fulfilling the fundamental ethical requirement of competent practice can be a challenge. The scope of expertise expected of an estate planning attorney is formidable. He or she must be familiar with the complexities of traditional estate planning, probate, tax, and property law, and be knowledgeable about planning for incapacity (including conservatorships). Depending on the client's assets, the attorney must also be familiar with the law governing business entities, intellectual property, and retirement benefits. If the client's family is not a traditional one, *e.g.*, if the client has had multiple marriages or if there are children of both spouses from previous marriages, if the clients are unmarried or domestic partners, or if the client is a single parent, there are often complex estate planning questions that must be addressed by the competent practitioner. In addition, there may be questions involving Medi-Cal planning.

California Rules of Professional Conduct 3-110 describes the attorney's duty to act competently. An attorney may not intentionally or recklessly fail to perform legal services competently. Cal Rules of Prof Cond 3-110(A). Performing legal services competently means diligently applying the learning and skill necessary to perform the attorney's duties that arise from representing the client. Cal Rules of Prof Cond 3-110(B). An attorney should not accept an estate planning assignment unless he or she will be able to handle matters in a diligent, timely manner. *Lewis v State Bar* (1981) 28 C3d 683, 170 CR 634 (attorney disciplined for undertaking estate administration despite complete unfamiliarity with probate laws and procedures).

An attorney who does not have sufficient learning and skills may:

- Continue to represent the client if the attorney associates or professionally consults another attorney who is believed to be competent (Cal Rules of Prof Cond 3-110(C); see §§2.35-2.37);
- Represent the client if he or she has enough time and resources and acquires the necessary learning and skills before any performance is required (Cal Rules of Prof Cond 3-110(C); see §2.34);
- Refer the client to a specialist in the area (Cal Rules of Prof Cond 3-110(C); see §§2.35-2.37); or
- Withdraw from representation or decline representation.

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§2.34 1. Duty to Do Research

An attorney must not only understand the basic principles of law known by well-informed attorneys but also discover rules of law that are not commonly known but may be found by standard research techniques. An attorney who fails to do such research when required can be liable for any resulting damage. See, *e.g., Smith v Lewis* (1975) 13 C3d 349, 118 CR 621, overruled on other grounds in *Marriage of Brown* (1976) 15 C3d 838, 851, 126 CR 633, in which an attorney representing the wife in a dissolution proceeding failed to assert her community property interest in her husband's retirement benefits. The court held the attorney liable for malpractice because he failed "to undertake reasonable research in an effort to ascertain relevant legal principles and to make an informed decision as to a course of conduct based upon an intelligent assessment of the problem." 13 C3d at 359.

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§2.35 2. Duty to Consult or Refer Client to Specialist

If an attorney undertakes a task in a specialized area of the law, he or she must exercise the degree of skill and knowledge possessed by attorneys who practice in that specialty. See Cal Rules of Prof Cond 3-110(B). Because an estate planning attorney must be familiar with such widely disparate specialties as tax planning and business law, this requirement is particularly important. Consequently, a cautious nonspecialist attorney who is confronted with a task in a specialized area of law should either consult or associate a specialist or refer the client to a specialist. Cal Rules of Prof Cond 3-110(C).

For example, an attorney who gives advice or prepares documents designed to minimize estate and gift tax liability must adhere to a high standard of specialized professional skill. See *Bucquet v Livingston* (1976) 57 CA3d 914, 129 CR 514 (attorney should have advised settlors of potential tax consequences of including general power of appointment in trust). Even when the client's net taxable estate is not large enough to incur estate or gift taxes, the cautious general practitioner should consider consulting with or referring the matter to a specialist if, for example:

- The client owns assets (*e.g.*, real property) that may appreciate greatly during the client's lifetime;
- The client is one party in a married or unmarried couple whose combined net taxable estates exceed the applicable exclusion amount;
- The client's spouse is not a United States citizen;
- The client's estate contains special assets such as options, intellectual property, substantial retirement assets, or a closely held business; or
- The client has assets in another state or country.

See chaps 3-6.

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§2.36 a. Selection of Specialist

An attorney who refers a client to a specialist should exercise caution in the selection of the specialist in order to avoid malpractice exposure for a negligent referral. The referring attorney should discuss a referral choice with the client at the initial conference. The referring attorney and the client should also discuss their prospective relationship, *e.g.*, whether the specialist will remain in the background as an adviser or a mere scrivener, or whether the specialist will be in direct contact with the client, creating and reviewing documents with the client.

The referring attorney should have a written fee agreement with the specialist. On referral fees and split fees, see §2.37.

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§2.37 b. Division of Fees

A division of fees, *i.e.,* fee splitting, is a single billing to a client covering the fee of two or more attorneys who are not in the same firm. If the referring attorney and the specialist agree to divide the fees, they must comply with Cal Rules of Prof Cond 2-200(A). This rule prohibits any division of fees unless the client consents in writing after full disclosure and prohibits the total fee from being increased unreasonably or solely by reason of the fee division. The rule does not require obtaining the client's written consent before the lawyers enter into a fee-splitting arrangement, or before the commencement of work, or at any time other than before the division of fees. Further, the rule does not require that the fee-splitting agreement between the attorneys be in writing. *Mink v Maccabee* (2004) 121 CA4th 835, 17 CR3d 486. The court noted that written agreements are preferable to oral ones, and that written consents obtained early in the process are preferable to those obtained after the fact, but that those preferences are not contained in Rule 2-200, and therefore cannot invalidate a written consent that complies in all respects with the plain language of the rule. 121 CA4th at 838.

The division of fees should be made on the basis of the proportion of services rendered or by agreement between the participating attorneys, if all assume responsibility for the representation as a whole and the client is advised and consents in writing. However, when an attorney merely brings about the employment of another attorney, but renders no service and assumes no responsibility in the matter, a division of the fees is improper when it does not comply with Cal Rules of Prof Cond 2-200(B).

Referral fees generally may not be paid to nonlawyers. See Cal Rules of Prof Cond 1-320.

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E. Duty to Nonclient

§2.38 1. No Duty to Adverse Party or if Arm's-Length Transaction

Ordinarily, an attorney has no duty to protect the interests of an adverse party, which means that an attorney may not be sued for negligent representation of a client by an adverse party in an action who claims to have suffered resulting injury from such negligence. *Omega Video Inc. v Superior Court* (1983) 146 CA3d 470, 480, 194 CR 574. The reasoning behind this holding is that the adverse party is not the intended beneficiary of an attorney's services and that the attorney's undivided loyalty belongs to the client. *Schick v Bach* (1987) 193 CA3d 1321, 1330, 238 CR 902.

Furthermore, attorneys owe no duty to third persons with whom their clients deal at arm's length. *Goodman v Kennedy* (1976) 18 C3d 335, 344, 134 CR 375. However, whether "arm's length" properly describes the relationship between the various attorneys and principals is a question of fact. *Shawmut Bank NA v Kress Assocs.* (9th Cir 1994) 33 F3d 1477, 1505. Depending on the factual circumstances, therefore, a case for liability could be made if, for example, the third party is a frail elder who is particularly dependent on the family member client.

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§2.39 2. Theories of Duty to Nonclient

An attorney advising clients has no duty to third persons affected by that advice "in the absence of any showing that the legal advice was foreseeably transmitted to or relied upon by plaintiffs or that plaintiffs were intended beneficiaries of a transaction to which the advice pertained." *Goodman v Kennedy* (1976) 18 C3d 335, 339, 134 CR 375. Thus, an attorney has duties to a nonclient when the basic intent and purpose of the attorney's service is to create rights for a third party, *e.g.,* the intended beneficiary (see §2.40), or when the attorney expects and intends that the third party will receive and rely on advice given to the client (see §2.41). *Schick v Bach* (1987) 193 CA3d 1321, 1330, 238 CR 902.

In addition, an attorney communicating on behalf of a client with a nonclient may not knowingly make a false statement of material fact to the nonclient. *Shafer v Berger, Kahn, Shafton, Moss, Figler, Simon & Gladstone* (2003) 107 CA4th 54, 131 CR2d 777.

NOTE: A successor fiduciary of an estate in probate may assert a professional negligence claim against attorneys retained by a predecessor fiduciary to provide tax assistance for the benefit of the estate. *Borissoff v Taylor & Faust* (2004) 33 C4th 523, 15 CR3d 735. Reading Prob C §§8524, 9820, and 10801 together, the supreme court concluded that the successor was not a third party, noting that California law does not equate the successor fiduciary's rights with those of the beneficiaries. Instead, the California Probate Code gives successor fiduciaries the same powers and duties their predecessors possessed, including the power to sue for malpractice harming the trust. 33 C4th at 530.

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Source: Estate Planning/Complete Plans for Small and Mid-Size Estates/2 Ethical Considerations/§2.40 a. Intended Beneficiary

§2.40 a. Intended Beneficiary

Under case law, an attorney has a duty of care to intended beneficiaries of a testator-client whose testamentary rights may be impaired if a will is negligently drafted. See *Heyer v Flaig* (1969) 70 C2d 223, 226, 74 CR 225, disapproved on other grounds in *Laird v Blacker* (1992) 2 C4th 606, 617, 7 CR2d 550; *Lucas v Hamm* (1961) 56 C2d 583, 15 CR 821; *Biakanja v Irving* (1958) 49 C2d 647, 320 P2d 16 (notary public who failed to have will properly attested was liable to intended beneficiary).

Compare these cases with the more recently decided cases of *Moore v Anderson Zeigler Disharoon Gallagher & Gray* (2003) 109 CA4th 1287, 135 CR2d 888, and *Radovich v Locke-Paddon* (1995) 35 CA4th 946, 41 CR2d 573 (attorney who prepared new will for client who died without executing it owed no duty of care to decedent's spouse as potential beneficiary named in unsigned will). In *Moore*, the court held that an attorney preparing a will for a testator owes no duty to the beneficiaries of the new or previous will to ascertain and document the client's testamentary capacity. The court reasoned that when the testator's testamentary capacity is the basis for a will challenge, the intent of the testator is the central question. The attorney who is persuaded of the client's testamentary capacity by personal observations and experience, and who drafts the will accordingly, fulfills the duty of loyalty to the testator. To require the attorney to consider the effect of the new will on beneficiaries would place an intolerable burden on attorneys. 109 CA4th at 1299.

Determining whether an attorney would be held liable to a third party requires the balancing of several factors, including the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injuries suffered, the moral blame attached to the defendant's conduct, and the policy of preventing future harm. *Biakanja v Irving* (1958) 49 C2d 647, 650, 320 P2d 16 (duty found). The court must also consider whether recognition of liability would unduly burden the profession. *Lucas v Hamm* (1961) 56 C2d 583, 15 CR 821 (duty found). See also, *e.g., Chang v Lederman* (2009) 172 CA4th 67, 90 CR3d 758 (no duty found after court balanced established case law factors); *Radovich v Locke-Paddon* (1995) 35 CA4th 946, 957, 41 CR2d 573 (no duty found).

An estate planning attorney may owe a duty of care to a disqualified person under Prob C §§21350-21356. In *Osornio v Weingarten* (2004) 124 CA4th 304, 21 CR3d 246, for example, the plaintiff nonclient was the named beneficiary under a will but was presumptively disqualified as a donee under Prob C §21350(a)(6) because she was care custodian to the testator, a dependent adult. She sued the defendant, the attorney who drafted the will, for negligence. The court considered the factors enumerated in *Lucas v Hamm* (1961) 56 C2d 583, 15 CR 821, and *Biakanja v Irving, supra,* and held that an attorney drafting instruments to transfer property to a presumptively disqualified person owed a duty of care to advise the client of the likelihood of presumptive disqualification and to recommend that the client seek independent counsel. 124 CA4th at 329. The court based its decision in part on the Restatement (Third) of Law Governing Lawyers §51 (2000) and the comment to that section, stating that a nonclient may assert a claim based on the lawyer's duty to the nonclient to use care when the lawyer knows that a client intends to benefit the nonclient and when the attorney's recognition of a duty to the nonclient would promote the "effective pursuit of the client's objectives." 124 CA4th at 338.

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§2.41 b. Foreseeable Third Party Reliance

Courts have also found a duty of care to third persons if the attorney expected that the legal advice given to the client would be transmitted to or relied on by the nonclient. See *Courtney v Waring* (1987) 191 CA3d 1434, 237 CR 233, questioned on other grounds in *Aronow v LaCroix* (1990) 219 C3d 1039, 1049 n5, 268 CR 866 (attorney who prepared misleading franchise prospectus on which nonclient franchisees relied in purchasing their franchises could be held liable to franchisees because advice was foreseeably transmitted and relied on); *Roberts v Ball, Hunt, Hart, Brown & Baerwitz* (1976) 57 CA3d 104, 111, 128 CR 901 (attorney liable to third party lender for providing written opinion letter to client misrepresenting client's organization, knowing and intending that opinion would be shown to lender by client to induce advance of loan to organization).

Performing work makes an actual client of the person whose estate is planned, even if the work is requested by another person whom the attorney views as the client. See *Ishmael v Millington* (1966) 241 CA2d 520, 50 CR 592. In *Ishmael*, the court found an attorney-client relationship (resulting in professional liability) when the husband's attorney agreed with the husband to act as the wife's attorney in a divorce action, prepared the papers, and filed the complaint. The court stated (241 CA2d at 527):

> Even in that situation [an uncontested divorce] the attorney's professional obligations do not permit his descent to the level of a scrivener. The edge of danger gleams if the attorney has previously represented the husband. The husband and wife at the brink of the division of their marital assets have an obvious divergence of interests.

Presumably, this holding for spouses would apply with equal force to papers drafted at the request of a family client for an elderly or frail family member to sign.

PRACTICE TIP: The attorney who performs work for one person at the request of a client when the client has or may have an interest in the outcome should treat all such cases as "dual representation" cases requiring compliance with conflict-of-interest rules.

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§2.42 IV. REPRESENTING MENTALLY IMPAIRED CLIENT

A client whose mental capacity is apparently impaired or questionable presents a difficult problem. Diminished capacity may be the result of a mental impairment, such as dementia, or some other cause (*e.g.,* substance abuse). With elderly clients, the attorney is often among the first to detect the client's diminishing capacity. Diminished mental capacity, greater susceptibility to undue influence, or a combination of the two can make competent representation impossible if the client cannot understand and intelligently evaluate the advice being given.

The attorney is bound by the duty of loyalty, the duty to maintain the client's confidences, the duty to avoid conflicts of interest, and the duty to vigorously advocate for the client's interest. Note that an attorney's duty is to represent the *client's interest*, which may be different from representing the *client's best interest*. (What constitutes a client's best interest is a subjective judgment based on society's standards overlaid by the attorney's personal morals.) On one hand, the attorney does not want to prevent a client from effectuating his or her lifetime or testamentary donative goals. On the other hand, the attorney does not want to assist the client in doing something that may be the result of diminished capacity. This problem is particularly acute when the attorney knows that the client's proposed course of action diverges from past practices, differs widely from that customarily done by people in similar circumstances, or seems suspiciously like the product of undue third party influence.

To address this ethical dilemma, which must be resolved, the attorney must know the applicable ethics law (see §2.43) and the standards and tests for legal capacity (see §§2.45-2.52), and must assess the client's capacity (see §§2.53-2.55) and decide whether representation is feasible.

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Source: Estate Planning/Complete Plans for Small and Mid-Size Estates/2 Ethical Considerations/§2.43 A. California Authority: Ethics Opinions

§2.43 A. California Authority: Ethics Opinions

California has no rule specifically addressing the duty (or options) of an attorney representing a mentally impaired client. The authority that does exist, contained in ethics opinions, essentially states that an attorney is prohibited from seeking appointment of a guardian or conservator for an apparently impaired client, or even seeking the consultation of a physician, without the client's written consent. This position is contrary to that of a majority of jurisdictions in the United States and the ABA Model Rules. See §2.44 on ABA Model Rules.

There are four ethics opinions dealing with the subject:

- California State Bar Formal Opinion No. 89-112, which states that an attorney who institutes conservatorship proceedings on a client's behalf without the client's consent violates the duties to protect client secrets and to avoid conflicts of interest.
- Los Angeles County Bar Association Ethics Opinion No. 1988-450, which states that an attorney cannot seek a conservatorship for his or her own client, because a conservatorship proceeding would be adverse to the client and, therefore, the attorney would be representing conflicting interests.
- San Diego Bar Association Ethics Opinion No. 1978-1, which states that an attorney must be satisfied that the client is competent to make a will and is not acting as a result of fraud or undue influence. Once the issue of capacity arises in the attorney's mind, the attorney should schedule an extended interview with the client alone, keep a detailed and complete record of the interview, and, if the attorney is still not satisfied that the client has capacity and is free of undue influence and fraud, decline to act and permit the client to seek other counsel or recommend a conservatorship.
- Legal Ethics Committee of the Bar Association of San Francisco Opinion 1999-2, which concludes that if an attorney reasonably believes that a client is substantially unable to manage his or her own financial resources or resist fraud or undue influence, the attorney may, but need not, take protective action with respect to the client's person and property, including recommending appointment of a trustee, conservator, or guardian ad litem. The opinion also states that the attorney has the implied authority to make limited disclosures necessary to achieve the client's best interests.

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Source: Estate Planning/Complete Plans for Small and Mid-Size Estates/2 Ethical Considerations/§2.44 B. ABA Model Rules

§2.44 B. ABA Model Rules

Unlike the California Rules of Professional Conduct, the ABA Model Rules of Prof Cond 1.14 and Comments to it specifically address the issue of representing a "client with diminished capacity" and protecting such a client. Under Rule 1.14(b), if an attorney reasonably believes that a client is at risk for substantial physical, financial, or other harm unless action is taken, and that a normal client-lawyer relationship cannot be maintained, the attorney "may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian."

Further, the ABA rules address the conflict with the duty of confidentiality (a duty that, under current California authority, is emphasized over all other interests of the impaired client) by expressly allowing the attorney "to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests." ABA Model Rules of Prof Cond 1.14(c). Thus, the attorney is impliedly authorized to make the necessary, limited disclosures, even when the client directs the lawyer to the contrary. Comment 8 to Rule 1.14.

WARNING: Until California clarifies the rules governing attorneys in this area, especially with regard to protective actions and disclosure of confidential information, the ABA Model Rule is not controlling and the California attorney is ethically bound to represent his or her client's interests (not best interests) or to withdraw from representation.

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Source: Estate Planning/Complete Plans for Small and Mid-Size Estates/2 Ethical Considerations/ C. Standards and Tests for Legal Capacity/§2.45 1. Due Process in Competence Determinations Act

C. Standards and Tests for Legal Capacity

§2.45 1. Due Process in Competence Determinations Act

California gives attorneys and courts guidance in assessing mental capacity. The Due Process in Competence Determinations Act (DPCDA) (Prob C §§810-813, 1801, 1881, 3201, 3204) codifies standards for determining whether a person is of "unsound mind" or "lacks the capacity to make a decision or do a certain act" (see §§2.46-2.47), including the capacity to (Prob C §811(a); see also Prob C §813):

- Contract;
- Make a conveyance;
- Marry;
- Make health care decisions;
- Execute wills; and
- Execute trusts.

NOTE: Except for its use in the title of DPCDA, the words "competent" and "incompetent" are not used; they are too general to be useful.

DPCDA creates a rebuttable presumption that all persons have the capacity to make decisions and be responsible for their acts or decisions. Prob C §810(a). A determination that a person is of unsound mind or lacks capacity is to be based on evidence of a deficit in one or more of the person's mental functions rather than on a diagnosis of a mental or physical disorder. Prob C §810(c). A person who has a mental or physical disorder may still be capable of contracting, conveying, marrying, making medical decisions, executing wills or trusts, and performing other actions. Prob C §810(b).

See generally Capacity and Undue Influence: Assessing, Challenging, and Defending, steps 10-23 (Cal CEB Action Guide February 2008).

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Source: Estate Planning/Complete Plans for Small and Mid-Size Estates/2 Ethical Considerations/§2.46 a. Evidence to Support Finding of Unsound Mind or Incapacity

§2.46 a. Evidence to Support Finding of Unsound Mind or Incapacity

A determination that a person is of unsound mind or lacks the capacity to make a decision or do a certain act must be supported by evidence of a deficit in at least one of the following mental functions (Prob C §811(a)):

- Alertness and attention;
- Information processing;
- Thought processes; and
- Ability to modulate mood and affect.

Each of these functions is further broken down in the Probate Code into specific manifestations. When any of the mental functions is impaired, as defined in Prob C §811(a), the frequency, severity, and duration of periods of impairment may be taken into account. Prob C §811(c). Furthermore, there must be evidence of both a deficit in one of the listed mental functions and a correlation between the deficit and the decision or acts in question. Prob C §811(a). The mere diagnosis of a mental or physical disorder (*e.g.*, Alzheimer's) alone is not sufficient to support a determination that a person is of unsound mind or lacks the capacity to do a certain act. Prob C §811(d).

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Source: Estate Planning/Complete Plans for Small and Mid-Size Estates/2 Ethical Considerations/§2.47 b. Ability to Communicate Decision and Understand Its Consequences

§2.47 b. Ability to Communicate Decision and Understand Its Consequences

A deficit in any of the specified mental functions is relevant only if, by itself or in combination with other mental function deficits, it significantly impairs the person's ability to understand the consequences of his or her actions with regard to the type of act or decision in question, as determined under the provisions of Prob C §812. Prob C §811(b).

Probate Code §812 states that a person lacks the capacity to make a decision unless he or she has the ability to communicate, verbally or by any other means, the decision, and to understand and appreciate, to the extent relevant:

- The rights, duties, and responsibilities created by or affected by the decision;
- The probable consequences for the decisionmaker, and if appropriate, the persons affected by the decision; and
- The significant risks, benefits, and reasonable alternatives involved in the decision.

The Prob C §812 standard applies unless there is a specific statutory provision for an act, such as making a medical decision or making a will. The capacity standards for medical decisions are defined by Prob C §813 (see §2.48), and testamentary capacity continues to be defined by statutory and decisional law (Prob C §§6100.5, 6104; discussed in §2.50).

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Source: Estate Planning/Complete Plans for Small and Mid-Size Estates/2 Ethical Considerations/§2.48 c. Capacity to Make Health Care Decisions

§2.48 c. Capacity to Make Health Care Decisions

Under Prob C §813, a person has the capacity to give informed consent to a proposed medical treatment if the person is able to do all of the following:

- Respond knowingly and intelligently to queries about the treatment;
- Participate in the treatment decision through a rational thought process; and
- Understand all of the following with respect to that treatment:
- the nature and seriousness of the illness, disorder, or defect;
- the nature of the treatment being recommended by the health care providers;
- the probable degree and duration of any benefits and risks of any medical intervention recommended by the health care providers, and the consequences of lack of treatment; and
- the nature, risks, and benefits of any reasonable alternatives.

The DPCDA test in §813 must be read in conjunction with Prob C §4657, which provides that a patient is presumed to have capacity to make a health care decision and to give or revoke an advance health care directive.

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§2.49 2. Specific Statutes Regarding Capacity

In addition to consideration of the DPCDA test, the attorney must consider various other statutes that codify the standards for determining a person's capacity to do or make a particular kind of act or decision and the cases that interpret those statutes. Most importantly, specific statutes apply to determinations of testamentary capacity (see §2.50) and the capacity to contract, convey, and make agency appointments (see §2.52). As noted in §2.48, Prob C §4657 provides a statutory presumption regarding capacity to make a health care decision and to give or revoke an advance health care directive.

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Source: Estate Planning/Complete Plans for Small and Mid-Size Estates/2 Ethical Considerations/§2.50 a. Testamentary Capacity

§2.50 a. Testamentary Capacity

Every adult of sound mind may make a will. Prob C §6100(a). An individual is not mentally competent to make a will if at the time the will is made either of the following is true (Prob C §6100.5(a)):

- The individual's mental capacity is not sufficient to be able to
- understand the nature of the testamentary act;
- understand and recollect the nature and situation of the individual's property; or
- remember and understand the individual's relationships to living descendants, spouse, parents, and others whose interests are affected by the will.
- The individual suffers from a mental disorder with various symptoms, including delusions or hallucinations that cause him or her to devise property in a way that he or she would not have done except for the delusion or hallucinations.

The standard for capacity to amend or revoke a will appears to be the same as the standard for making a will. See, *e.g.*, Prob C §6124. The execution or revocation of a will can also be made ineffective to the extent the execution or revocation was procured by undue influence. Prob C §6104.

PRACTICE TIP: Some attorneys support a testator's capacity in a questionable case by a videotape record of the entire conference during which the will execution takes place. The videotape can be evidence of the testator's capacity and allows the testator to explain unusual provisions in the will. The videotape may deter disgruntled relatives from bringing a contest. The attorney should be aware, however, that videotapes have risks. If the testator appears to be in a deteriorating physical condition or hesitates unduly in answering questions or exhibiting knowledge of his or her property or family relationships, the videotape may work to the disadvantage of proponents of the will.

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§2.51 b. Capacity to Create a Trust

DPCDA, by its terms, applies to the capacity to execute trusts and sets out the test for determining whether a person lacks capacity to establish a trust. See §2.45. However, unlike the capacity to create a will, the test for capacity to establish a trust is not set forth in a specific statute; but it has been the subject of a variety of analytical approaches based on other specific statutes. Some argue that a person who has the capacity to contract is considered to have the capacity to create a trust. Hess, Bogert, & Bogert, The Law of Trusts and Trustees (3d ed 2000). Others hold that the capacity necessary to create a trust is the same as the capacity to transfer property. 13 Witkin, Summary of California Law, *Trusts* §25 (10th ed 2005); see *Walton v Bank of Cal.* (1963) 218 CA2d 527, 541, 32 CR 856. See §2.52.

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Source: Estate Planning/Complete Plans for Small and Mid-Size Estates/2 Ethical Considerations/§2.52 c. Capacity to Contract, Convey, or Make Agency Appointments

§2.52 c. Capacity to Contract, Convey, or Make Agency Appointments

Civil Code §1556 provides that all persons are capable of contracting except minors, persons of unsound mind, and persons deprived of civil rights. A person entirely without understanding has no power to make a contract of any kind. CC §38. A conveyance or contract made by a person of unsound mind, but not entirely without understanding, made before the person's incapacity has been judicially determined (see CC §40), is subject to rescission (CC §39(a)).

Under California case law, the test for determining competency to transfer and convey property has been held to be the same as the test for determining testamentary capacity. See *Tuttle v Bessey* (1955) 137 CA2d 725, 727, 290 P2d 884; *Hughes v Grandy* (1947) 78 CA2d 555, 564, 177 P2d 939 (both involved capacity to execute a deed).

Anyone with the capacity to contract may appoint an agent (CC §2296) and execute a power of attorney (Prob C §4120). An adult having capacity may execute a power of attorney for health care. Prob C §4671.

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3. Assessment of Client Capacity

§2.53 a. Attorney Evaluation

The initial client meeting provides an opportunity for the attorney to assess the client's capacity and to learn more about medical issues that may affect the client's situation or planning considerations. The attorney should inquire about family medical history generally and be alert to possible medical issues. One of the most effective means to ensure the validity of estate planning documents and transfers is for the attorney to document the initial client interview that establishes the client's knowledge of his or her property and his or her relationships to relatives.

The attorney should also be aware of signs of fraud or undue influence. It is not uncommon for a client—typically an elderly client or one with physical impairments—to come to the meeting accompanied by a family member or friend. However, the attorney generally should conduct all dealings directly with the client and, depending on the circumstances, meet alone with the client to ensure that the client has the opportunity to discuss his or her wishes without the presence of the third party.

PRACTICE TIP: Even if the person is found to have capacity, there may be undue influence. Some people will pass a capacity test but cannot resist undue influence. See Capacity and Undue Influence: Assessing, Challenging, and Defending, steps 25-30 (Cal CEB Action Guide February 2008).

In addition, the attorney should watch for "red flags," such as proposals to change the client's estate plan disproportionately to favor the person accompanying the client or his or her relatives or friends, to prepare a durable power of attorney for financial matters naming that person as attorney-in-fact, or to place assets in joint tenancy with that person or make other title changes "for convenience." Although these requests are warranted in many situations, they can also be the means by which an unscrupulous person can take advantage of the client.

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§2.54 b. Mental Status Assessment by Health Care Professional

If there is significant uncertainty about an elder's capacity, the attorney may consider recommending that the client undergo a mental status assessment, which can be obtained from psychologists who specialize in geriatric matters. The test can be undertaken only if the elder has consented and agreed to pay for its cost. The assessment can be geared toward the standards for judicial determinations of capacity specified in Prob C §811 (see §§2.45-2.47).

If the services of a diagnostician are used, the attorney should condition legal representation on a diagnosis confirming capacity both to retain counsel and to engage in the particular legal transactions.

Counsel should also consider speaking to the client's treating physician or in-home care providers for information on mental deficits and to determine whether the doctor diagnosed a specific illness, *e.g.*, early stages of Alzheimer's. Counsel must obtain the client's permission before interviewing these sources. The next step is to assess which abilities a particular deficit affects. For example, a geriatric neuropsychologist may provide insight about whether a severely depressed person can make his or her own medical decisions.

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§2.55 4. Physical Incapacity Distinguished

A client's apparent difficulty in comprehension may arise from physical impairments or difficulties rather than mental incapacity. A client may be slow to respond, *e.g.,* because he or she has a hearing loss, or is taking medication that results in drowsiness for a period of time after ingestion, or has a form of aphasia that affects communication but not comprehension. Sometimes physical frailty alone may be misconstrued as an indication of mental deterioration.

It is essential that the attorney be sensitive to the distinction between physical and mental impairments, especially in frail elderly clients. Thus, attorneys might find it useful to add to their client information checklist queries about physical impairments and about current medications.

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§2.56 V. UNETHICAL OR INVALID DONATIVE TRANSFERS FROM CLIENT TO ATTORNEY

After many years of representation in which the attorney has worked closely with the client, giving valued advice in many emotional and very personal situations, it may be difficult to determine where the professional relationship ends and friendship begins. The client can become increasingly dependent on the estate planning attorney. The relationship of extreme trust combined with increasing dependence may cause the client to ask the attorney to be the client's fiduciary (conservator, executor, or trustee). It can also cause the client to view the attorney as a possible object of his or her bounty in gratitude for the years of advice and counsel.

These situations pose ethical problems for any attorney under Cal Rules of Prof Cond 4-400, which prohibits the attorney from inducing a client to make a substantial gift, including a testamentary gift, to the attorney or a member of the attorney's family unless the client is related to the attorney. The estate planning attorney whose client wants to leave a gift to the attorney is in a particularly awkward position because the client also expects the attorney to prepare the documents required in both of these situations. Attorneys are forbidden to do so except under very narrow circumstances.

In addition, donative transfers to the attorney may also be invalid under Prob C §§21350-21356, which void transfers to a "disqualified person." Prob C §21350.5. Probate Code §§21350-21356 make void any gift of any size made to an attorney who drafts the donative instrument or causes it to be drafted. An exception arises only if the attorney is related by blood or marriage to, or cohabits with, the donor, or if the client consults an independent attorney who prepares and signs a Certificate of Independent Review stating that the gift was not the result of fraud, menace, duress, or undue influence by the attorney. Prob C §21351. A violation of Prob C §§21350-21356 is grounds for discipline if the attorney knew or should have known of the facts leading to the violation. Bus & P C §6103.6.

For discussion of disqualified transfers, see chap 6.

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§2.57 VI. CIRCULAR 230

In recommending tax-saving strategies, the estate planning attorney must consider the effect of Circular 230 (31 CFR pt 10), which promulgates practice standards applicable to attorneys, CPAs, and other persons who represent taxpayers in dealings with the Internal Revenue Service. Circular 230 is intended to deter tax practitioners from issuing tax opinion letters that may shield taxpayers from IRC §6662 accuracy-related tax penalties despite incomplete fact statements, dubious factual assumptions, and even more dubious legal analysis.

Cono Namorato, director of the IRS Office of Professional Responsibility (OPR), speaking at the 24th Annual Federal Tax Institute in Chicago, indicated that the Circular 230 rules are generally meant for "fringe behavior involving tax scams and schemes." 107 Tax Notes 542 (May 2, 2005). Mr. Namorato also stated on a webcast of the IRS-cosponsored Tax Talk Today program, as reported in 107 Tax Notes 808 (May 15, 2005), that the rules were drafted to address real, serious abuses occurring in major accounting and law firms.

Attorneys preparing plans for simple estates should not be offering opinions concerning a listed transaction requiring compliance with Circular 230. Therefore, the following sections are meant only to give a broad overview of the Circular 230 rules and a practical suggestion for how to avoid violating the rules.

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Source: Estate Planning/Complete Plans for Small and Mid-Size Estates/2 Ethical Considerations/§2.58 A. Advising and Informing Clients

§2.58 A. Advising and Informing Clients

Under 31 CFR §10.34(b), a practitioner may not advise a client to

- *Take a position* on a document, affidavit, or other paper submitted to the IRS unless the position is not frivolous; or to
- *Submit a document, affidavit, or other paper to the IRS* whose purpose is to delay or impede the administration of the federal tax laws; that is frivolous; or that contains or omits information in a manner that demonstrates an intentional disregard of a rule or regulation unless the practitioner also advises the client to submit a document that evidences a good faith challenge to the rule or regulation.

Under 31 CFR §10.34(c), a practitioner is required to inform clients of penalties that are "reasonably likely to apply" to the client with respect to:

- A *position taken* on a tax return if the practitioner advised the client with respect to the position or prepared or signed the tax return; or
- Any document, affidavit, or other *paper submitted* to the IRS.

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B. Covered Opinions

§2.59 1. Written Advice That Is a Covered Opinion

Circular 230 imposes standards in connection with "covered opinions" on tax matters. 31 CFR §10.35(a). A "covered opinion" is an opinion regarding certain tax shelters and reportable transactions that is subject to more stringent standards and rules than apply to other types of advice. A covered opinion includes written advice (including e-mail) concerning federal tax issues arising from any of the following (31 CFR §10.35(b)(2)(i)(A)-(C)):

- Transactions listed by the IRS as tax shelter transactions;
- Transactions that have as a *principal purpose* avoidance or evasion of tax; and
- Any partnership or other entity, any investment plan or arrangement, or any other plan or arrangement, *a significant purpose* of which is the avoidance or evasion of any tax if the written advice is, inter alia, a "reliance opinion."

Written advice that concludes only that there is substantial authority with respect to the proper tax treatment of the proposed transaction generally is not a covered opinion, unless marketing (31 CFR §10.35(b)(5)) or conditions of confidentiality (31 CFR §10.35(b)(6)) bring the advice within the covered opinion standard.

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§2.60 2. Definition of Reliance Opinion

Written advice that is a covered opinion is a "reliance opinion" if the advice concludes that it is "at least more likely than not" that one or more significant federal tax issues would be resolved in the taxpayer's favor. 31 CFR §10.35(b)(4)(i). A "significant federal tax issue" is defined as significant if the IRS has a reasonable basis for a successful challenge and its resolution could have a significant impact on the overall federal tax treatment of the matter. 31 CFR §10.35(b)(3).

Written advice, other than advice concerning certain transactions described in 31 CFR §10.35(b)(2)(i)(A), (B), is not treated as a reliance opinion if the practitioner prominently discloses in the written advice that it was not intended or written by the practitioner to be used, and that it cannot be used by the taxpayer, for the purpose of avoiding penalties that may be imposed on the taxpayer. 31 CFR §10.35(b)(4)(i). See also 31 CFR §10.35(e)(4).

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§2.60A 3. Requirements for Covered Opinions

Advice in the form of a covered opinion must comply with detailed requirements relating to the use of reasonable factual assumptions and the need to provide a conclusion with respect to each significant issue considered in the opinion. The requirements are set out in 31 CFR §10.35(c).

Covered opinions, including reliance opinions that fail to reach a more likely than not conclusion with respect to all significant federal tax issues, must prominently disclose that (31 CFR §10.35(c)(4)):

- The opinion does not reach a conclusion at a confidence level of at least more likely than not with respect to one or more significant federal tax issues addressed by the opinion; and
- With respect to those significant federal tax issues, that the opinion was not written, and cannot be used by the taxpayer, for the purpose of avoiding penalties that may be imposed on the taxpayer.

NOTE: Types of advice that are not covered opinions requiring compliance with 31 CFR §10.35(c) are listed in 31 CFR §10.35(b)(2)(ii)(A)-(E). Any written advice (again, including e-mail) that does not constitute a covered opinion is subject to the standards of 31 CFR §10.37.

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§2.60B C. Circular 230 Penalties

The Secretary of the Treasury, or delegate, after notice and an opportunity for a proceeding, may censure (*i.e.,* publicly reprimand), suspend, or disbar any practitioner from practice before the Internal Revenue Service if the practitioner is shown to be incompetent or disreputable (within the meaning of 31 CFR §10.51), fails to comply with any regulation in 31 CFR pt 10 (under the prohibited conduct standards of 31 CFR §10.52), or with intent to defraud, willfully and knowingly misleads or threatens a client or prospective client. 31 CFR §10.50(a). A monetary penalty may also be imposed. 31 CFR §10.50(c).

For discussion of Internal Revenue Code tax preparer penalties under IRC §6694, see §3.109.

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§2.60C D. Practical Suggestions

With regard to covered opinions, cautious practitioners should avoid writing opinions that directly or indirectly state that it is "more likely than not (a greater than 50-percent likelihood)" that one or more significant tax issues will be resolved in a client's favor. Alternatively, the practitioner may include a prominent disclosure that the opinion was not intended or written by the practitioner to be used, and that it cannot be used by the taxpayer, for the purpose of avoiding penalties that may be imposed on the taxpayer. For example, the disclosure may state:

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

If such a disclosure is used, the advice is not a reliance opinion, and therefore it will not be a covered opinion unless the plan or arrangement is a "listed transaction" (*i.e.,* a transaction identified by the IRS as a tax-avoidance transaction) under Treas Reg §1.6011-4(b)(2) or the transaction has the "principal purpose" of tax avoidance or evasion as defined in Treas Reg §1.6662-4(g)(2)(ii). 31 CFR §10.35(b)(4)(ii).

NOTE: In the context of tax shelters, the taxpayer may not have protection from accuracy-related tax penalties in the absence of an opinion containing such a "more likely than not" assessment, but in other than tax-shelter cases the opinion will normally provide such protection even without a likelihood estimate, provided it states that there is "substantial authority" for the specified tax treatment. IRC §6662(d)(2)(B)(i), (d)(2)(C); Treas Reg §1.6664-4(f).

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VII. ATTORNEY-CLIENT RELATIONSHIP

§2.61 A. Identifying the Client

The most important question for the estate planner is, "Who is the client?" Identifying the client is obviously a threshold issue in all cases. Status as a client is required to trigger an attorney's duties, including the duty to avoid conflicts of interest. Furthermore, clearly identifying the client will often shed light on other important related ethical issues, such as confidentiality and diminished capacity.

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§2.62 B. Creation of Attorney-Client Relationship

The attorney-client relationship is created by contract (express or implied) and governed by the general rules of agency. See, *e.g., Sullivan v Dunne* (1926) 198 C 183, 192, 244 P 343; *Fidelity & Cas. Co. v Abraham* (1945) 70 CA2d 776, 783, 161 P2d 689. See also 1 Witkin, California Procedure, *Attorneys* §§68-69 (4th ed 1996). The conduct of both the principal and the agent must indicate acceptance of the relationship.

No formality, and in particular no fee or even fee agreement, is a prerequisite before the duty arises. See *Miller v Metzinger* (1979) 91 CA3d 31, 39, 154 CR 22. In *Miller*, an attorney-client relationship was found to exist even though the attorney did not agree to represent the client, charged no fee for his services, did not have the client sign a retainer agreement, and believed that his function was purely investigatory. When a party seeking legal advice consults an attorney at law and secures that advice, the relationship of attorney and client is established prima facie. *Perkins v West Coast Lumber Co.* (1900) 129 C 427, 62 P 57.

Although its formation may be informal, however, the attorney-client relationship does not exist merely because a party believes that an attorney is representing his or her interests. See *Fox v Pollack* (1986) 181 CA3d 954, 959, 226 CR 532, in which the court held that an attorney did not owe a duty of professional care to an unrepresented party in a real estate exchange in which the attorney represented the opposing party. For purposes of application of the attorney-client privilege, Evid C §951 defines a client as a person who consults a lawyer for the purpose of retaining the lawyer or securing legal service or advice in the lawyer's professional capacity.

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Source: Estate Planning/Complete Plans for Small and Mid-Size Estates/2 Ethical Considerations/ C. Scope of Representation/§2.63 1. Importance of Defining Scope of Representation

C. Scope of Representation

§2.63 1. Importance of Defining Scope of Representation

The attorney must describe the general nature of the services to be rendered (*i.e.,* the scope of the representation) in the engagement letter. Bus & P C §6148(a)(2). (A written fee agreement is required when it is reasonably foreseeable that the total expense to the client will exceed $1000 (Bus & P C §6148(a).) If the scope of the representation is not defined, the attorney may fail to fully provide the services expected by the client, resulting in a possible malpractice action, or may provide too many services, resulting in the client's refusal to pay for something he or she did not want or expect.

If the attorney is being engaged to prepare an estate plan for a new client who is about to inherit trust assets from a family member, the client may also expect to receive advice regarding the family member's trust and the client's rights as a beneficiary. If the client is a fiduciary in that other matter, he or she may expect representation in that capacity.

Crafting an estate plan can involve a complex cross-section of legal, accounting, and investment advice. For instance, if the estate planning attorney prepares a plan involving various business entities, either new or existing, the client may expect the attorney to form those entities and to advise the entities on business matters. If the estate planning attorney is engaged to give advice on lifetime gifts (*e.g.,* transfer of residence), the client may expect the attorney to prepare the gift tax returns that will be required for the year of the gift. The estate planning attorney may be expected to assist with selecting the insurance after preparing a life insurance trust, or to be responsible for title changes associated with funding or unfunding a trust. The attorney should be careful to identify the exact nature and scope of the services to be rendered and document the division of responsibility, *e.g.,* among attorneys, between the attorney and accountant or other professional adviser, and between the client and attorney. The attorney should clarify and document the scope of representation and the division of responsibilities in the engagement letter.

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§2.64 2. Certificate of Independent Review to Qualify Transfer to Disqualified Person

A particularly narrow but compelling example of the need to define the scope of the representation arises when the attorney is asked to prepare a Certificate of Independent Review under Prob C §21351(b). The certificate has the specific purpose of qualifying a donative transfer to a transferee who would otherwise be a "disqualified person" as defined under Prob C §21350.5. Either the client or his or her beneficiaries may incorrectly perceive the attorney to be rendering an opinion that the desired transaction has been properly done and is appropriate for the client when in fact the attorney's attention is directed solely to determining whether the transfer is "not the product of fraud, menace, duress or undue influence." To avoid a claim in the future by either the client-transferor or beneficiaries that the attorney failed to identify and point out some flaw in the transaction or plan, the attorney should document the narrow scope of the representation (*i.e.,* the preparation of the Certificate of Independent Review) in the engagement letter, making it clear that he or she is assuming no responsibility for the plan itself.

There is explicit statutory authority for limiting the scope of representation for purposes of preparing a Certificate of Independent Review. Prob C §21351(b). Section 21351(b) states that any attorney whose written engagement signed by the client is expressly limited solely to the preparation of a Certificate of Independent Review, including the prior counseling, shall not be considered to otherwise represent the client.

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§2.65 3. Termination of Representation

Defining the scope of the representation includes defining its duration. Unlike services rendered in the context of litigation, estate planning services are often performed over many years, and it may be difficult to identify when they begin or end. The relationship between the attorney and client is usually open-ended, and, unless the engagement letter or some other document makes it clear when the relationship will end, the question of ongoing representation can continue until the client's death and beyond.

There is no authority in California imposing on attorneys a duty to keep clients apprised of changes in the law that might affect the client's estate plan. Nonetheless, from time to time, commentators have suggested that such a duty might be imposed, and the cautious estate planning attorney may wish to define in the engagement letter the extent to which the client can expect the attorney to provide ongoing advice about future changes.

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D. Special Issues in Representing an Elder

§2.66 1. When Only the Elder Is the Client

Some attorneys will agree to represent an elder only if it is clear that the elder is the only client and that the attorney will not represent the interests of other family members. In this situation, the attorney has no conflict of interest because there is only one client to whom the duties of loyalty run unambiguously.

If an attorney has had a prior attorney-client relationship with an elder, that elder will remain a "client" for ethical purposes in almost all cases; the attorney's duty to the elder client prevents representation of other parties whose interests may be adverse to those of the elder client. See §2.22. This view is reflected in Cal Rules of Prof Cond 3-310(E).

If the elder is the appropriate client, a private meeting should be held between the elder and the attorney. The attorney can then ascertain the elder's own desires and doubts removed from the expectations and pressures of other family members. A private meeting will allow the attorney to reach his or her independent conclusions about the client's legal capacity to perform the acts and make the decisions necessary, *e.g.,* to effect a valid estate plan. A private meeting also provides an opportunity for the attorney to create a record of independent advice and client response to rebut a potential later claim of undue influence by other family members.

If the elder appears to be mentally impaired, the client may be difficult and the family may also present problems. See §2.42 regarding the attorney's duty to clients with limited mental capacity. Another common threshold problem in representing a mentally impaired elder is legal capacity. See §§2.45-2.55.

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§2.67 a. Family Participation

When representing an elder whose family participated in the initial consultation, or may still participate in other meetings, it is important that the attorney make clear to the family members that he or she is not representing their interests. The attorney should advise family members in writing that they are not clients and that they should obtain independent legal advice if they have any concerns about their legal positions.

Even if the elder clearly has capacity and is able to meet with the attorney, the elder and the family may desire to meet together. However, the family's very presence raises serious questions of confidentiality, undue influence, and conflicts of interest. Some attorneys avoid any ambiguity by insisting on interviewing the elder alone before involving any family members. But unless this approach is handled with great care, it can cause stress and anxiety for the elder. Many elders are very dependent on their families for emotional and intellectual support, and will feel threatened by the unexpected demand of a stranger to meet alone. Furthermore, sequestering the family immediately may cause the family members, who may feel they have a right to be present, to react negatively.

As a practical matter, discussion of ethical issues is often better delayed to the end of the meeting, after a relatively neutral exchange of information, during which the attorney should avoid even the appearance of favoring one family member over any other. If at the end of the first consultation it becomes clear that the objectives and concerns of some family members conflict, one or more referrals may be immediately appropriate. If, however, there appear to be common goals among the family members, the practitioner can ask the family to identify who will be the client. This approach provides a convenient opening for a discussion of the issues that must be considered in making the decision: the need to avoid conflicts of interest, to protect confidential communications, and to optimize the interests of a single client. By this time the attorney has also learned enough about the family and the elder to have a personal opinion about whom he or she wants as a client and to contribute to the decision in an informed way.

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§2.68 b. Family Members as Agents or Advisers

It is not uncommon for the family to initiate the consultation and bring along an elder with questionable or reduced capacity. It is also not uncommon that an elder client may have the requisite mental capacity but lack the stamina for the mental rigors and diligent responsiveness that are necessary to follow through with the planning. After reviewing the alternatives, many families and elders are happy to accept the designation of the elder as the client, but with the elder's designation of the family, or some of the family members, as agents with whom the attorney may routinely and conveniently deal.

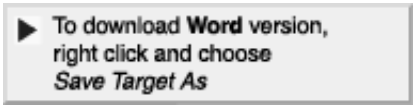
The attorney should confirm such an agency arrangement in writing, either in a confirming letter or in the written employment agreement, or both. The confirmation should include a disclosure of the implications of the arrangement, *i.e.,* that the attorney will be able to communicate freely with the agents about the elder's affairs and accept their instructions to take certain actions and prepare certain documents. The attorney may want to assure the elder client that all final important decisions must be approved by the client personally. The attorney may even want the client to sign and return a copy of the letter to confirm the arrangement when, for example, other family members do not clearly support the objectives of the planning effort. See §2.69 for sample clauses.

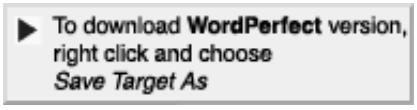
Some practitioners reject an agency approach on the ground that it is too likely to result in a breach of the elder client's right to confidentiality. Moreover, they feel that the role given to the family member "agents" can be so powerful and so likely to determine the direction of planning that charges of undue influence may be raised. Finally, the family member may take on the aspect of an additional client. The result may be a form of dual representation—without the required disclosures, written consents, and professional attention. Whether such concerns are warranted varies with the particular circumstances.

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Source: Estate Planning/Complete Plans for Small and Mid-Size Estates/2 Ethical Considerations/§2.69 c. Form: Sample Paragraphs in Engagement Letter Confirming Family Member's Role

§2.69 c. Form: Sample Paragraphs in Engagement Letter Confirming Family Member's Role





2.69-1 Sample paragraphs in engagement letter confirming family member's role

Finally, I want to confirm our attorney-client relationship. Although you and members of your family all met with me together regarding planning for you, we agreed that you will be my sole client. This means that my duties as an attorney run exclusively to you. These include my duties of confidentiality, care, and loyalty to your interests. I do not represent any members of your family or their interests, as I told them at the end of our meeting.

[*Option 1: Add if family members will serve as advisers*]

However, you indicated that you would like the following family member(s) to be able to participate in our meetings: _ _[*name(s) and relationship(s)*]**_ _. This means I may further discuss your affairs with _ _**[*him/her/them*]**_ _ and that you must waive your legal right of confidentiality regarding _ _**[*him/her/them*]**_ _. Although you want these family members to act as advisers, all final decisions on your planning are yours alone. In addition, you may tell me at any time if you want to change your mind about these arrangements.** _ _[*Accordingly, I will take no final actions on your planning without your express agreement.*]_ _

[*Option 2: Add if family members will serve as agents*]

However, you indicated that you would like the following family member(s) to act as your agent(s) to help you accomplish the planning we discussed: _ _[*name(s) of family member(s)*]**_ _. This means that I may further discuss your affairs with _ _**[*him/her/them*]**_ _, communicate with you through _ _**[*him/her/them*]**_ _, and that you must waive your legal right of confidentiality regarding _ _**[*him/her/them*]**_ _. Although you want these family members to act as your agent(s), all final decisions on your planning are yours alone. In addition, you may tell me at any time if you want to change these arrangements. _ _**[*Accordingly, I will take no final actions on your planning without your express agreement.*]**_ _**

[*If applicable, add the following option*]

[*Option: Add if family member(s) will be paying fee*]

You also authorized me to accept payment for my services from _ _[*name(s)*]**_ _ and _ _**[*gave me/will be giving me*]**_ _ written consent to receive payment from a nonclient as required by law.**

[*Continue*]

If you have any questions about any of the above, please let me know at once. I will further confirm our attorney-client relationship in a written employment agreement that I will send to you for your review, approval, signature, and return.

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§2.70 d. Payment of Attorney Fees

An elder client must personally pay for the legal work unless a waiver allowing someone else to pay is obtained under Cal Rules of Prof Cond 3-310(F). The issue of who will pay often arises because it is fairly common for family members to offer to pay for both the initial consultation and other legal work required for an elder. The offer usually arises from a desire not to further stress the elder, who may already be in limited economic circumstances or from an appreciation that much of the proposed planning is often ultimately for the benefit of the younger family members.

The requirements of a waiver under Cal Rules of Prof Cond 3-310(F) can be difficult to meet as an administrative matter, because the family's choice of who is to pay is rarely evident until the end of the first meeting. Presumably the requirements can be met by a boilerplate disclosure and consent for the elder to sign at the end of the initial meeting. Otherwise, as a technical matter, attorneys must refuse payment from any family member until the paperwork is prepared and signed, even with the elder client's oral consent. The issue is further complicated if, as is common, the elderly client holds his or her cash assets in a joint account with a younger family member. In this situation, it is not even clear if the ethics rule is triggered when the younger joint tenant signs the check on the elder's account. See form in §2.69 for sample waiver provision.

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§2.71 2. Representing a Family Member

It is common for a family member to seek representation in order to secure estate planning and related services for a nonclient elder. The attorney represents and advises only the client, acts on his or her instructions as scrivener, and makes no pretense of looking after the interests of any other party, even the elder for whom the planning is being done. There is presently no ethical rule prohibiting such representation. However, it is nearly impossible to avoid ethical and professional pitfalls when representation of a family member involves decisions about the elder's property and autonomy, involving transfer of assets from the elder, as well as increased powers for the family member to handle the elder's affairs.

There is a serious potential for allegations of undue influence. See CC §1567(4) (apparent consent to contract not real when obtained through undue influence); CC §1575 (definition of undue influence); and Prob C §6104 (ineffectiveness of execution or revocation of a will procured by undue influence). If, for example, the beneficiary was in a confidential relationship with the elder and actively participated in procuring the plan, undue influence will be *presumed* if the beneficiary unduly benefits. See *O'Neil v Spillane* (1975) 45 CA3d 147, 119 CR 245. See also *Estate of Aiello* (1980) 106 CA3d 669, 676, 165 CR 207. However, acts of a child in service to a parent do not in and of themselves give rise to a presumption of undue influence or fraud. To find undue influence, the court must be convinced that the conveyance to the child was not the donor's voluntary act. See, *e.g., Goldman v Goldman* (1953) 116 CA2d 227, 253 P2d 474.

In addition, if the elder is a client when the family member seeks representation, the attorney must obtain informed written consent to the new representation. See §§2.26-2.30.

NOTE: If the family member actively participates in procuring the elder's estate plan and is a beneficiary of the plan, the gift may be void as a gift to a disqualified person under Prob C §21350 if the family member is not a related person as defined in Prob C §21350(b). See §2.56.

Because of the significant issues of professional ethics raised when a family member seeks representation in this situation, there is a widespread view that the elder law attorney should refuse such representation unless the elder has independent counsel. Other attorneys deliver to the elder a written disclaimer warning that they do not represent the elder but only the interests of the family member who is the client.

Some attorneys assert that the family member-client who undertakes to assist an elder with estate planning or similar services has fiduciary duties to the elder and should be aware of these duties when acting on the elder's behalf. They liken the relationship to that of a trustee to a beneficiary and a conservator to a conservatee. The legal authority for this position is unclear. Because of the many ethical dangers, refusing to represent a family member-client who seeks estate planning and related services "for" an elder may be simple good sense as well as ethically correct.

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§2.72 3. Representing Family Member and Elder

Practitioners may want to represent both the family member and the elder. There is no rule that prevents dual representation in principle as long as the attorney obtains informed written waivers. Cal Rules of Prof Cond 3-310. See §§2.26-2.30. It is in fact typical in conventional estate planning for married couples. However, dual representation in an elder law context brings with it special problems. Even if the ethical requirements are clear, the attorney may find it difficult to implement them, particularly when the family member is much more alert and engaged as a client than the elder. Dual representation may then end up combining the worst of both worlds—the practical problems of dealing with infirm or impaired elderly clients and the ethical problems of dealing with family member-clients.

There are substantial risks if an attorney represents closely related parties, even if there has been a waiver, at least when there is any indication of a dependent relationship, and the transaction benefits the party on whom the other party is dependent. See, *e.g., Haynes v First Nat'l State Bank* (NJ 1981) 432 A2d 890. How does an attorney fulfill his or her duty to represent two clients when an economic gain to one necessarily means loss to the other? If the elder is frail or infirm, the relationship itself may reflect such a degree of dependency as to create a presumption of undue influence. This presumption may, as a matter of public policy, preclude a valid waiver of the conflict, and, in turn, prevent dual representation.

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3

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§3.1 I. INTRODUCTION

Taxes that affect estate planning include federal gift and estate taxes, the generation-skipping transfer tax (GST), state estate taxes, out-of-state inheritance taxes, real property taxes, and federal and state income taxes. In planning for transfers of property, whether during lifetime or at death, the income tax basis that the property will have in the hands of the transferee is often an important consideration. An in-depth discussion of these taxes and tax issues is beyond the scope of this book. This chapter is primarily intended to give the practitioner an overview of these taxes and to identify issues that should be considered in preparing estate plans.

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II. GIFT TAX

§3.2 A. Role of Inter Vivos Gifts in Estate Planning

One of the most fundamental estate planning goals is to pass property from its owner to the owner's beneficiaries at the lowest possible tax cost. Although structuring property transfers at the owner's death is certainly the focus of many planning vehicles, the attorney should not overlook opportunities presented by various inter vivos gifts. Inter vivos gifts may offer important transfer (estate, gift, and generation-skipping) tax and income tax advantages, especially for wealthier clients who are financially secure and who are willing to part with assets during their lifetime.

Nontax considerations may also play an important role in the use of lifetime gifts for estate planning purposes. For example, inter vivos gifts provide the donee immediate use and enjoyment of the property and afford the donor an opportunity to observe how younger-generation beneficiaries make use of the gifts. The donor may want to help younger beneficiaries buy a first home or start a business. Accordingly, the estate planner must be alert not only to the tax implications of various transactions but also to the client's overall nontax goals and wishes.

NOTE 1: Far too often, tax concerns are allowed to outweigh nontax considerations, to the ultimate dissatisfaction of the client and his or her beneficiaries. Even when gifts are made for nontax reasons, however, they should nonetheless be structured, if possible, to take advantage of applicable exclusions and deductions.

NOTE 2: Beginning in 2010, the donor must provide the donee with information about the adjusted basis and fair market value of gifted property. IRC §6019.

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B. Planning Issues: An Overview

§3.3 1. Gift Tax Exclusions and Deductions

Gift planning for estates that exceed the applicable estate tax exclusion amount under IRC §2010 ($2 million for decedents dying in 2007 and 2008, increasing to $3.5 million for decedents dying in 2009) is an important vehicle for shifting wealth to younger generations. Annual gifts allow a donor to take advantage of the annual gift tax exclusion while removing assets—as well as future appreciation in those assets—from the donor's taxable estate at death. See §3.13. In addition, the donor may remove assets and their appreciation from his or her estate by taking advantage of the lifetime exclusion of $1 million in gifts under IRC §2505 (see §3.14), and the unlimited gift tax marital deduction for gifts of a donor spouse to a donee spouse who is a United States citizen or the inflation-adjusted annual gift tax exclusion for a noncitizen donee spouse (see IRC §2523(a), (i); §3.22). Direct medical and educational payments may also qualify for exclusions from gift taxes. See §3.15. Certain gifts to or for minors and students may qualify for exclusion from gift taxes. See §§3.16-3.20. Finally, there is an unlimited gift tax deduction for outright charitable gifts under IRC §2522. See §3.24.

Each type of gift requires careful analysis balancing the advantages of gift tax savings against the possible estate, generation-skipping transfer, real property transfer, and income tax consequences.

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§3.4 2. Other Potential Tax Benefits of Inter Vivos Gifts

Inter vivos gifts may also have the following potential tax benefits:

- **Lower tax rates.** Although gift tax rates are the same as estate tax rates, gift tax rates are effectively much lower. This is because the estate tax is imposed on the entire amount of property transferred at death ("tax inclusive"), whereas the property used to pay the tax is not included in calculating the gift tax unless the gift was made within 3 years before the donor's death (IRC §2035(b)) ("tax exclusive"). Beginning in 2010, gifts will be taxed at the donor's highest personal income tax rate. IRC §2502(a). Thus, in 2010, the highest gift tax rate will be 35 percent. See IRC §1.

- **Freeze values.** For tax purposes, inter vivos gifts can "freeze" the value of transferred property as of the time of transfer. For example, it is ordinarily better to make a gift of an asset with a value of $100,000 than to pay estate tax on it after it has appreciated to $200,000 or has produced income that has similarly increased the value of the estate. On valuation, see §3.12.

- **Structure estate.** Inter vivos gifts also allow the donor to structure the character of what will comprise the donor's estate at death. Illiquid assets or assets difficult to value may be removed from the estate. Carefully planned inter vivos gifts may enable the donor's estate to take advantage of special use valuation (see IRC §2032A), the installment payment of estate tax (see IRC §6166), and stock redemption provisions (see IRC §303) by removing nonqualifying assets from the estate so that the percentage tests set by these sections will be met. See chap 5.

- **Use of life insurance gift.** An inter vivos gift of life insurance can achieve significant tax benefits because life insurance generally has a relatively low current value in the hands of the insured and for gift tax purposes, but may become a significant asset in the hands of the beneficiaries.

- **Income tax savings.** Inter vivos gifts can offer income tax savings because they generally relieve the donor of income tax liability attributable to the gifted property. Further savings can be achieved by shifting the taxation of income generated by the gifted property to individuals in lower marginal tax brackets. On the other hand, an increasingly popular estate planning tool is the irrevocable grantor trust, which permits transfer of property and the income generated by that property to the younger generation, while the income tax on the income is paid by the donor/settlor. The payment of the income tax is a transfer of wealth to the trust beneficiaries, but it is not treated as a taxable gift for gift tax purposes. See §§3.94-3.95 for discussion of grantor trusts.

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§3.5 3. Possible Tax Disadvantages of Inter Vivos Gifts

A significant tax disadvantage of making inter vivos gifts, aside from incurring transfer tax for gifts over the annual exclusion amount not made to a spouse, is the potential lost opportunity for acquiring a stepped-up basis for the gifted property at the donor's death. See §3.106 for explanation of carry-over basis of an inter vivos gift. Thus, if a client owns property having a value greater than its current income tax basis (either because the value has increased or because the client has claimed depreciation deductions for income tax purposes), careful analysis is necessary before making that property the subject of an inter vivos gift.

In addition, uncertainty over the future of the estate tax (see §3.27) creates a related uncertainty over the utility of inter vivos gifts as an estate planning strategy, presenting a problem for estate planners. The estate tax applicable exclusion amount will increase incrementally until 2010 (IRC §2010(c)). Absent further legislative action, the estate tax will be repealed in 2010 (IRC §2210(a)), although sunset provisions are scheduled to revive the estate tax in 2011 with a $1 million exclusion. If the estate tax is repealed, or if the estate tax applicable exclusion amount increases significantly, as expected, the tax advantages of making gifts to remove assets from an estate will be lost. Gifts may nevertheless continue to be advantageous because of income tax savings created by shifting income to persons in lower brackets.

Another possible disadvantage of making an inter vivos gift is that the gifted property might depreciate in value between the time of the gift and the donor's death. If the property does depreciate, the donor's estate tax exemption that was used up by the gift, or the gift tax paid, as the case may be, will have been wasted to the extent of the decrease in value.

Lifetime gifts on which tax must be paid are sometimes used to reduce the size of larger estates. The funds used to pay the gift tax are removed from the estate unless the gift is made within 3 years before the donor's death. However, for the years before 2010, careful calculation is required to determine whether the present cost of the gift tax on lifetime gifts in excess of the exclusion amount ($1 million until 2009) (IRC §2505(a)) and the resulting transfer of carryover basis (IRC §1015(a)) will produce greater combined estate and income tax savings compared with the monetary benefit of a stepped-up, date-of-death basis for the property under IRC §1014.

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§3.6 4. Possible Nontax Dangers

In addition to tax issues, inter vivos gifts entail the following risks:

- A significant change in the donor's circumstances for the worse might threaten the donor's financial security.
- If the donor later changes his or her mind about the intended beneficiaries, the gifted property will ultimately pass to a person whom the donor may not have wished to benefit.
- Unequal gifts can create friction among family members.
- The gifted property may result in ineligibility for, or a reduction of, future public benefits for disabled donees or donees otherwise eligible for public assistance.
- Gifts to or for the benefit of children or young people may affect their eligibility for college financial aid (see §§7.42, 3.20).
- Inter vivos gifts are often made to irrevocable trusts in order to provide additional tax and asset-protection benefits. However, such trusts add complexity to the family's financial and legal affairs and may result in greater annual accounting and legal expenses.

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C. Transfers Subject to Gift Tax

§3.7 1. Taxable Gift Defined

The gift tax is imposed on lifetime transfers of property for less than adequate and full consideration in money or money's worth. IRC §§2501(a), 2512(b). The gift tax applies to transfers of property by U.S. citizens and residents by direct or indirect gift, in trust or otherwise, regardless of whether the property is real or personal, or tangible or intangible. IRC §2511(a). In addition to outright gifts, the gift tax may apply to indirect transfers, such as the creation of a trust, forgiveness of a debt, or assignment of insurance benefits. Treas Reg §25.2511-1(a).

NOTE: For nonresident alien donors, the gift tax applies only to transfers of real and tangible property in the United States. IRC §2511(a)-(b). For other special rules that apply to nonresident alien donors, see IRC §§877, 2501(a)(2)-(3), 2511(b); Treas Reg §§25.2511-1(b), 25.2511-3.

The gift tax may apply even if a gift was not intended. The tax is based on the objective facts of the transfer and the circumstances under which the gift is made, not the donor's subjective motives. Treas Reg §25.2511-1(g)(1). Further, although a transfer of property in which the donor retains an economic interest may be considered a completed gift, the property may be included in the donor's gross estate for estate tax purposes under IRC §2036. See §3.32; *Estate of Margot Stewart,* TC Memo 2006-225. The transfer does not result in double taxation, because the amount of the gift is excluded from adjusted taxable gifts in calculating the tentative tax under IRC §2001(b).

WARNING: If the client has made gratuitous lifetime transfers, counsel should ascertain whether such transfers were intended as gifts or loans. Loans should be documented. See §3.9. If the client has made any gifts in excess of the annual gift tax exclusion amount for the year of the gift, gift tax returns should be prepared and filed.

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§3.8 2. Warning: Unintended Gifts

An individual may unwittingly and without donative intent make transactions that are considered gifts for tax purposes. See Treas Reg §25.2511-1(g)(1). Common examples of unintended gifts include loans at below-market interest rates (see §3.9) and creation of a joint tenancy or withdrawal from a joint tenancy bank account or surrender of a jointly held bond (see §3.10). Other examples include:

- **Exercise or release of general powers of appointment.** The exercise or release of a general power of appointment created after October 21, 1942, is treated as a gift by the powerholder for gift tax purposes. IRC §2514(b). The lapse of a power during the powerholder's lifetime is treated as a release to the extent specified in IRC §2514(e). For further discussion of powers of appointment, see §3.30.

- **Discharge of indebtedness.** Forgiveness of a debt or legal obligation for no consideration generally constitutes a gift at the time of discharge. Treas Reg §25.2511-1(a). This rule does not apply to discharge of the tax liability on jointly filed income tax returns when one spouse pays the entire tax. Treas Reg §25.2511-1(d).

NOTE: If a loan is forgiven at death, the principal amount of the loan and any accrued interest due the lender are included in the lender's gross estate for federal estate tax purposes. Treas Reg §20.2033-1(b).

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§3.9 a. Below-Market-Rate Loans

With a few exceptions (see IRC §7872(c)(2)(A), (3), (f)(8)), any loan with a below-market interest rate when the forgoing of interest "is in the nature of a gift" is treated as a gift loan, and thus subject to gift tax liability. IRC §7872(f)(3). For this purpose, the term "loan" covers any extension of credit. Prop Treas Reg §1.7872-2(a). There are two types of gift loans:

- Demand loans (fully payable on demand with interest rate lower than applicable federal rate; forgone interest is treated as a gift (IRC §7872(a), (e)(1)(A), (f)(2)(B), (5)); and
- Term loans (loan other than demand loan in which amount lent exceeds the present value of all payments due; excess amount treated as gift (IRC §7872(b)(1), (d)(2), (e)(1)(B), (f)(6)).

Loans on which no interest, or below-market-rate interest, is charged may involve imputed interest issues for income tax purposes. See IRC §7872.

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§3.10 b. Joint Tenancies

Creation of a joint tenancy may result in a gift if there has been a completed transfer. If a joint tenant who has furnished all the consideration in creating the joint tenancy is permitted to terminate the joint ownership unilaterally and retrieve the entire property, the transfer is not complete for gift tax purposes unless the noncontributing joint tenant draws on the account, at which point there is a gift to the extent of the withdrawal. See Treas Reg §25.2511-1(h)(4). For example, if a mother creates a joint bank account for herself and her daughter, the mother makes a taxable gift of any amount the daughter withdraws from the account for her own benefit. The same result occurs if the mother has purchased a savings bond payable to the mother or the daughter and the daughter surrenders the bond for cash without any obligation to give the mother part of the proceeds. Treas Reg §25.2511-1(h)(4).

However, when the transfer into the joint tenancy cannot be completely reversed by the transferor alone, as with a creation of a joint tenancy in real property, a gift will have been made on the transfer; an exception applies in the case of such transfers between spouses. Treas Reg §25.2511-1(h)(5).

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§3.11 3. Warning: Incomplete Gifts

The estate planning attorney must know the gift tax law well enough to help the client guard against unintentional failure to complete an intended gift by retaining powers or interests. A gift is completed only when the donor has no power to change its disposition. Treas Reg §25.2511-2(b). For example, if the donor delivers a properly endorsed stock certificate to the donee or the donee's agent, the gift is completed on delivery; but if the donor delivers the certificate to the donor's own agent, the gift is completed on the date the stock is transferred on the corporation's books. Treas Reg §25.2511-2(h). Transfer of real property by the owner to joint tenancy with another is also a completed gift at the time of the transfer. See Treas Reg §25.2511-2(b). Recordation of the deed is not required for a completed gift. See CC §1217. See also *Estate of Margot Stewart,* TC Memo 2006-225.

Problems related to incomplete gifts are particularly likely to arise with transfers in trust. If a donor reserves a power to change the beneficiaries, the gift is incomplete, even if the donor cannot personally receive the property. Treas Reg §25.2511-2(c). Generally, if the donor transfers property to an irrevocable trust and retains an income interest, there is a completed gift of the remainder but not the income interest. If the exercise of the trustee's power in favor of the donor is limited by an ascertainable standard, the gift is incomplete to the extent of the ascertainable value of the rights retained by the donor. Treas Reg §25.2511-2(b).

NOTE: In 2010, when the estate tax is scheduled to be repealed if Congress takes no further action, any transfer in trust will be treated as a taxable gift unless the trust is a grantor trust treated as owned by the donor or the donor's spouse under IRC §§671-679. IRC §2511(c).

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§3.12 D. Valuation of Gifts

A gift is valued at its fair market value as of the date of the gift. IRC §2512(a). As with the valuation of property for estate tax purposes, fair market value is defined as "the price at which such property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell, and both having reasonable knowledge of relevant facts." Treas Reg §25.2512-1. One tax advantage of lifetime gifts is that, if fractional interests in an asset are gifted to more than one donee, they are valued separately; in contrast, for estate tax purposes the transferred interests would be valued in the aggregate. Thus, a minority discount may apply to each fractional interest gifted. *Samuel J. LeFrak,* TC Memo 1993-526. Special valuation rules apply to certain transfers of certain interests in corporations and partnerships to family members. IRC §§2701, 2704.

A gift of encumbered property is generally valued at the excess of the unencumbered fair market value of the property over the outstanding debt. *Fernie C. Laughinghouse* (1983) 80 TC 425. If property is transferred for less than full and adequate consideration, only the amount that exceeds the consideration paid is included in the amount of the gift. IRC §2512(b).

To establish the value of the gift for both estate and gift tax purposes, the donor must disclose the gift on a gift tax return. The value of the gift is conclusively established if the reported valuation is not challenged by the IRS within the 3-year limitations period, provided there was adequate disclosure of valuation issues on the return. IRC §§2001(f), 6501(c). For further discussion of valuation issues, see McCaffrey, *Transferring Property by Defined Value Clauses*, Estate Planning 2004, chap 6 (Cal CEB 2004).

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E. Gift Tax Exclusions

§3.13 1. Annual Exclusion

Under IRC §2503(b), the first $10,000 (plus cost-of-living adjustments) of gifts to any person, other than gifts of future interests in property, made during a calendar year are not included in the total amount of gifts made during such year. The 2009 annual exclusion amount is $13,000. Rev Proc 2008-66, 2008-45 Int Rev Bull 1107. There is no limit to the number of recipients to whom a donor may make an annual exclusion gift each year. Thus, a donor with numerous objects of his or her bounty may significantly reduce his or her estate with tax-free transfers. Unused amounts may not be carried over to another year.

NOTE: Under IRC §2513, spouses can elect to treat a gift of separate property made by the owner spouse to a third party as being made one half by each spouse. This allows one spouse to use both spouses' IRC §2503(b) annual exclusions and IRC §2505 gift tax credit. In 2009, for example, this would allow a total tax-free gift of $26,000 to each donee. This election is not available to same-sex domestic partners treated as spouses under California law. 1 USC §7.

Annual exclusion gifts do not reduce the donor's IRC §2010 applicable exclusion amount for gift or estate tax purposes.

The annual exclusion applies to gifts of present interests and does not apply to gifts of future interests. IRC §2503(b)(1). A present interest is defined as an "unrestricted right to the immediate use, possession, or enjoyment of property or the income from property (such as a life estate or term certain)." Treas Reg §25.2503-3(b). A future interest is defined as "a legal term, and includes reversions, remainders, and other interests or estates, whether vested or contingent, and whether or not supported by a particular interest or estate, which are limited to commence in use, possession, or enjoyment at some future date or time." Treas Reg §25.2503-3(a).

Gifts to trusts that postpone the beneficiary's enjoyment to a future time usually do not qualify for the annual exclusion. For discussion of the three types of trusts that can be used to qualify some or all of the transfers to a trust for the annual exclusion (the "income trust," the "minor's trust" under IRC §2503(c), and the *Crummey* trust (see §3.19)), see Drafting California Irrevocable Trusts, chap 12 (3d ed Cal CEB 1997).

Beginning in 2010, any transfer to a trust, other than a trust treated as a grantor trust of the donor or the donor's spouse, will be treated as a gift. IRC §2511(c). For discussion of grantor trust provisions, see §3.94.

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§3.14 2. Lifetime Exclusion

Each United States citizen and resident is allowed a $1 million lifetime "applicable exclusion" against all gifts he or she makes after December 31, 1975, other than those that qualify for the exclusion for medical or educational payments (see §3.15), or for the marital or charitable deduction (see §§3.21-3.24). See IRC §2505. The $1 million applicable exclusion amount is not in addition to the estate tax exclusion amount; any part of the applicable exclusion amount used to offset gift tax will reduce the applicable exclusion amount available to offset estate tax at the donor's death. See §3.26.

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§3.15 3. Medical and Educational Payments

Under IRC §2503(e), certain qualified payments made on behalf of an individual for tuition or medical care are excluded from gift tax. This exclusion is not limited in amount. It is available in addition to the annual gift exclusion and without regard to the relationship between the donor and the donee. Treas Reg §25.2503-6(a). For the definition of medical expenses, see IRC §§213(d), 2503(e)(2)(B); Treas Reg §25.2503-6(b)(3). For education expenses, see IRC §§529, 2503(e)(2)(A); Treas Reg §25.2503-6(b)(2). Payments must be made directly to the medical or educational institution or medical service provider, not as a reimbursement to an individual. IRC §2503(e)(2); Treas Reg §25.2503-6(c), Example (4). A transfer by a donor directly to a university qualifies for the exclusion, but a transfer to a trust with provisions to use the funds for tuition expenses for a donee does not. See Treas Reg §25.2503-6(c), Example (2).

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§3.16 4. Gifts to Younger Generations, Minors, and Students

Gifts to children and other younger-generation beneficiaries offer opportunities for transfer tax savings. For example, a married couple can reduce the size of their combined gross estate by making regular inter vivos gifts to their children. Inter vivos gifts to children and others are also frequently made to provide the donees with an education or with professional training, to assist them in starting a business or other enterprise, or to enable them to purchase a home. Frequently, these needs arise long before younger-generation beneficiaries can expect to inherit property at the donor's death. Because young people are often in a lower income tax bracket than their parents, such gifts can reduce the family's aggregate income tax burden by reducing the income tax that is due on the income generated by the gifted property. (The gifts themselves do not constitute taxable income to the recipient.)

Gifts or bequests to minors or students present several unique planning challenges. The investment income of a child under the age of 19 (age 24 in the case of a student) whose earned income does not exceed one-half of the amount of his or her support is subject to the "kiddie tax," with the result that the child's income over a certain amount is taxed at the parent's income tax rate. IRC §§1(g)(2)(A), 152(c)(3). See §3.90.

An outright gift, or a gift in trust, to a minor or college student can adversely affect the donee's eligibility for financial aid, while gifts to a qualified tuition program or Coverdell Education Savings Account will not be considered an asset of a student for purposes of federal student financial aid. 20 USC §1087vv(f). See chap 7; §3.20. When a client wishes to make a gift to a beneficiary who may need financial assistance to attend college, the attorney should advise the client to consult a financial aid planner.

When a donee is very young, or is not financially sophisticated, the client may wish to use a trust or other mechanisms to ensure that the gift is properly managed and that the donor's purposes are fulfilled. However, the planning and administrative costs may outweigh the tax benefits of the gift. In addition, because the income tax rates for trusts are steeply graduated (see §3.97), it is generally not a good idea to accumulate income in a trust for future distribution.

Some of the vehicles used when making gifts to minors or students are described in the following sections.

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§3.17 a. Guardianship

An outright gift to a minor who has a legally appointed guardian of his or her estate (see Prob C §§1500, 1510, 1601), or a gift to the guardian in such capacity, is considered a gift of a present interest that qualifies for the annual gift tax exclusion under IRC §2503(b). See *Beatrice B. Briggs* (1960) 34 TC 1132, acq 1961-2 Cum Bull 4. Income generated by property held by a guardian is taxable to the minor. Treas Reg §1.641(b)-2(b). Because of the compressed rates that apply to income taxed to a trust (see IRC §1(e)), this may provide an acceptable result despite the possible application of the "kiddie tax" (see §§3.90, 3.97).

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§3.18 b. Uniform Gifts to Minors Act

The California Uniform Transfers to Minors Act (CUTMA) (Prob C §§3900-3925) offers a number of planning opportunities for donors wishing to make gifts to minors without the imposition of a guardianship or trust. A donor may, under CUTMA, create a custodianship for inter vivos gifts that enables the custodian to pay the custodial property to the minor, or use it for the minor's benefit, without court order and without consideration of any person's duty to support the minor or of any other available income or property of the minor. See Prob C §3914(a).

If the donor extends the custodianship period in the document of transfer, inter vivos gifts may be held until the donee attains age 21. Prob C §3920.5(e). Because the donee must receive the property at least by age 21, the gift will qualify for the $12,000 (in 2008; $13,000 in 2009) annual gift tax exclusion. See IRC §2503(b)-(c). See also Rev Rul 56-86, 1956-1 Cum Bull 449 (allowing annual gift tax exclusion under IRC §2503(b)-(c) for transfer to a similar form of custodianship).

Generally, the income from custodial property is treated as income of the minor for income tax purposes. An exception may apply if the income is used to support the minor and discharges a parent's support obligation; in that situation, the income may be taxed to the parent. See Rev Rul 59-357, 1959-2 Cum Bull 212. Probate Code §3914(c) specifically states, however, that any payments by a custodian are in addition to, and not a substitution for, an obligation to support the minor. This provision may be sufficient to ensure that custodianship income is not taxed to the obligated parent (and may presumably prevent adverse estate tax consequences). See Treas Reg §20.2041-1(c)(1). See also Drafting California Irrevocable Trusts §12.14 (3d ed Cal CEB 1997).

If the donor is also the custodian and dies before the minor reaches age 21, the gifted property will be included in the donor's estate under IRC §2038(a)(1).

For further discussion of CUTMA gifts, see chap 7.

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§3.19 c. *Crummey* Trusts

For tax years before 2010, *Crummey* trusts are used to obtain the annual gift tax exclusion while at the same time allowing the trust to extend for the benefit of the minor beyond age 21. See *Crummey v Commissioner* (9th Cir 1968) 397 F2d 82. A *Crummey* trust commonly gives the trustee discretion to pay to, or for the benefit of, the minor, amounts of income and principal the trustee considers appropriate until the age of distribution of the trust, but also allows the minor to withdraw specified assets from the trust. This withdrawal power of the minor gives the minor a present interest in the property subject to the power, and therefore the transfer of that property qualifies for the annual gift tax exclusion. See IRC §2503(b); Rev Rul 73-405, 1973-2 Cum Bull 321.

Another feature of a *Crummey* trust is that, unlike a CUTMA account, it can have more than one beneficiary, although in certain circumstances this can present tax complications when *Crummey* powers lapse. For further discussion of *Crummey* trusts, see California Estate Planning, chap 10 (Cal CEB 2002), and Drafting California Irrevocable Trusts §§12.80-12.110 (3d ed Cal CEB 1997).

After 2009, all transfers to nongrantor trusts will be treated as gifts (IRC §2511(c)), thus qualifying for the gift tax annual exclusion (see §3.13).

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§3.20 d. Qualified Tuition Plans and Coverdell ESAs

A qualified tuition program (QTP) (also known as a 529 plan or program) is a program designed to allow a donor to either prepay, or contribute to an account established for paying, a student's qualified education expenses at an eligible educational institution. QTPs can be established and maintained by states (or agencies or instrumentalities of a state) and eligible educational institutions. See IRC §529(e)(1), (3), (5). California participates in a qualifying QTP. For the definition of basic terms, see chap 7.

Under IRC §529, gifts to qualified tuition programs qualify for the annual exclusion even though they would otherwise fail to qualify because they would be gifts of future interests. IRC §529(c)(2)(A)(i). A donor making a gift in excess of the annual exclusion limit may elect to have the contribution treated as if it were made over 5 years. Thus, five times the regular IRC §2503(b) exclusion amount ($13,000 in 2009) can be claimed in the current year, although, as a result of this "advance," no annual exclusions will be available in subsequent years until, in effect, the advance is repaid. IRC §529(c)(2)(B); see Rev Proc 2008-66, 2008-45 Int Rev Bull 1107. If the donor fails to survive this repayment period, the amount of the advance remaining "unpaid" is included in the donor's estate. IRC §529(c)(4). Note that these gifts are not gifts of tuition that are subject to the unlimited gift tax exclusion for tuition payments under IRC §2503(e). IRC §529(c)(2)(A)(ii). See §3.15.

There are no income restrictions on the individual contributor. IRC §529(b)(6). All contributions must be in cash. See IRC §529(b)(2). Contributions are not deductible for income tax purposes.

Since 2001, distributions made for qualified educational expenses are tax-exempt. IRC §529(c)(1)(A), (3). If distributions are not applied toward qualified higher education expenses, the portion of the distribution that represents earnings will be taxed as ordinary income to the distributee. IRC §529(c)(3)(A); Prop Treas Reg §1.529-3(b).

For further discussion of qualified tuition plans, see chap 7; California Estate Planning, chap 21A (Cal CEB 2002).

Internal Revenue Code §530 Coverdell Education Savings Accounts (Coverdell ESAs), previously known as Education IRAs, offer an additional opportunity to save for educational expenses. Coverdell accounts were established to allow contributors to set aside funds in an IRA-type account to be used for educational purposes. As with an IRC §529 plan, contributions must be made in cash; the earnings and distributions are tax-exempt when used for educational purposes. Contributions are not deductible for income tax purposes and the aggregate contributions to each beneficiary's account may not exceed $2000 per year. Contributions are subject to income restrictions. IRC §530(c)(1). No contributions are allowed after a beneficiary, other than a special needs beneficiary, reaches the age of 18. See IRC §530. For further discussion of Coverdell ESAs, see chap 7.

PRACTICE TIP: A 529 plan and a Coverdell ESA will not be considered an asset of a student for purposes of federal student financial aid. 20 USC §1087vv(f).

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§3.21 F. Gift Tax Deductions

Only two deductions are allowed in computing the amount of taxable gifts: the marital deduction and the charitable deduction. IRC §2503(a); see IRC §§2522-2523; see also IRC §2524 (limits on deduction). However, expenses for tax advice and return preparation related to the gift may be deductible for income tax purposes. IRC §67(b); Temp Treas Reg §1.67-1T(a)(1)(iii).

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1. Marital Deduction

§3.22 a. Allowance of Deduction

An unlimited gift tax deduction is allowed for outright gifts to the donor's spouse, if the spouse is a U.S. citizen. IRC §2523(a). The deduction is not available for same-sex domestic partners treated as spouses under California law. 1 USC §7.

An annual exemption of $100,000, adjusted for inflation, is allowed for gifts to a noncitizen spouse. IRC §2523(i)(2). For 2009, this exemption is $133,000. Rev Proc 2008-66, 2008-45 Int Rev Bull 1107. This exemption is in lieu of the IRC §2503(b) annual gift tax exemption (see §3.13).

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§3.23 b. Terminable Interest Rule

No deduction is allowed for a gift of a terminable interest to a spouse. A terminable interest is one that will terminate or fail on the lapse of time, or on the occurrence or failure to occur of an event or contingency, if either (IRC §2523(b)):

- The donor retains, or gives to a third party, an interest in the gifted property such that the donor or third person may possess or enjoy any part of the gifted property after the termination or failure of the interest transferred to the donee spouse; or

- If, immediately after the transfer to the donee spouse, the donor has a power to appoint an interest in the gifted property such that the appointee may possess or enjoy any part of the gifted property after the termination or failure of the interest transferred to the donee spouse.

The donor spouse is not considered to have a retained interest if the donee spouse is given an interest in property as a joint tenant (or as tenant by entirety) with the donor spouse, even though it is possible that the donor may reacquire the gifted interest by surviving the donee spouse (IRC §2523(d)) or if the donee spouse is given a life estate with the sole power to appoint the entire interest, exercisable in favor of the donee spouse, or the estate of the donee spouse (IRC §2523(e)).

An exception to the terminable interest rule allows a deduction for an interspousal gift of qualified terminable interest property (QTIP). IRC §2523(e)-(f). QTIP property is property in which the donee spouse has a qualifying income interest for life and with respect to which an irrevocable QTIP election is made. IRC §2523(e), (f)(2). When QTIP property is given to the donee spouse in trust, additional requirements must be satisfied. The donee spouse must be entitled to all net trust income for life, and the donee spouse must have the power to require that the trustee make unproductive property productive or convert it to productive property. Treas Reg §25.2523(e)-1(f). For a detailed discussion of QTIP gifts, see California Estate Planning, chap 17 (Cal CEB 2002).

No gift tax return is required for an interspousal gift qualifying for the gift tax marital deduction, except for certain gifts in trust when an election is required to qualify the marital gift as a qualifying income interest in trust. See Estate Planning, chap 17.

PRACTICE TIP: It is important for spouses to document gifts to each other. As long as there is proper documentation, it is relatively easy to prove that an interspousal lifetime gift took place. Proper documentation of the date of transfer is especially important in deathbed transfers to a spouse.

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§3.24 2. Gift Tax Charitable Deduction

An unlimited gift tax deduction is allowed for outright charitable gifts. The donee must be an organization described in IRC §2522(a). See IRS Pub. 78 (Cumulative List of Organizations Described in Section 170(c) of the Internal Revenue Code of 1986).

Gifts of partial interests and gifts with a retained interest in the donor or a noncharitable beneficiary, called split-interest charitable gifts, do not qualify for the gift tax charitable deduction unless they fall within an exception. The exceptions include a charitable interest that is an undivided portion of the donor's entire interest, a remainder interest in a personal residence or farm, a qualified conservation contribution, a charitable remainder trust or pooled-income fund, a guaranteed annuity interest, or a unitrust interest. Treas Reg §25.2522(c)-3(c)(2). The amount of the deduction is the fair market value of the partial interest on the date of the gift. Treas Reg §25.2522(c)-3(d).

For a detailed discussion of partial-interest gifts to charity, see California Estate Planning, chaps 23-24 (Cal CEB 2002).

WARNING: Split-interest charitable gift documents must be carefully drafted to conform to the highly technical requirements prescribed by IRC §664 and a series of Revenue Rulings and Revenue Procedures. See, *e.g.*, Rev Proc 2005-59, 2005-34 Int Rev Bull 412; Rev Proc 2005-52, 2005-34 Int Rev Bull 326; Rev Proc 2003-60, 2003-2 Int Rev Bull 274. Improper drafting can render the entire gift taxable. It is recommended that counsel associate an attorney with expertise in this area or refer the client to a specialist.

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§3.25 III. ESTATE TAX

In most cases, an estate that will be subject to the federal estate tax cannot be considered simple. Estate tax planning for married couples is particularly complex and requires familiarity with the use of marital deduction and bypass trusts. See §§3.36-3.45.

The difficulty of planning a larger estate is compounded by the uncertainty of the future of the federal estate tax. Currently, the estate tax is scheduled to be repealed for the estates of individuals dying after December 31, 2009, and before January 1, 2011. IRC §2210(a). See §3.27.

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§3.26 A. Imposition of Federal Estate Tax

The federal estate tax is imposed on the "taxable estate" of every decedent who is a citizen or resident of the United States. IRC §2001(a). For individuals dying in the years 2006 through 2008, the federal estate tax applies to taxable estates of $2 million or more, after adjusting for taxable gifts made during lifetime. For individuals dying in 2009, the federal estate tax applies to taxable estates of $3.5 million or more, after adjusting for lifetime taxable gifts. IRC §2010(c).

The amount of the taxable estate is arrived at by subtracting allowable deductions from the gross estate. IRC §2051. See §§3.28-3.34. The largest deductions are typically those for mortgages and other debts and, in the case of a married decedent, the estate tax marital deduction. Deductions are also available for expenses incurred in the administration of the decedent's estate and postmortem administration of the decedent's revocable trust. See §3.48.

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§3.27 B. General Planning Considerations

In ascertaining the probable size of a client's estate, the attorney should consider the client's family situation. If the client may inherit property in the foreseeable future, will this increase the size of the client's estate enough to make the federal estate tax a factor? Does the client have a power of appointment over a parent or other relative's assets that could result in the inclusion of those assets in the client's estate?

In determining whether a married couple's estate will be subject to the federal estate tax, the assets of each spouse should be considered both separately and together. For federal estate tax purposes, the estate of each spouse includes his or her separate property and his or her share of community property or other jointly owned property. Even if each spouse's estate is less than the amount that would be subject to federal estate tax (see §3.26), leaving all of the assets of the first spouse to die to the surviving spouse may increase the size of the survivor's estate enough to cause it to be subject to federal estate tax. See §3.41.

NOTE: If the distribution scheme does not allow nonprorata allocation of assets, whether outright or in trust (including distribution to subtrusts as part of a marital deduction plan or otherwise), there may be adverse income and real property tax consequences, even if there will not be an estate tax. See §§3.88 (income tax) and 3.77 (real property tax).

Another important consideration is the uncertainty of the future of the estate tax. The estate tax applicable exclusion amount for decedents dying in 2009 is $3.5 million per person. Unless Congress takes further action, the estate tax is scheduled to be repealed for the estates of decedents dying after December 31, 2009. IRC §§2010(c), 2210(a). Further, unless Congress takes further action, the gift tax is not repealed, and a separate gift tax schedule that effectively imposes a single 35-percent tax rate will apply beginning in 2010. IRC §2502(a)(2). In 2011, the unified estate and gift rates will be revived with a $1 million applicable exclusion amount. Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA-2001), §901 (Pub L 107-16, §901, 115 Stat 38). Many attorneys believe that further legislative changes to the transfer tax laws are likely to occur before that date.

PRACTICE TIP: A properly drafted power of attorney giving the agent powers to modify the estate plan can provide flexibility to respond to future changes in tax law and other factors affecting the client's estate plan, while preserving confidentiality. See Dennis-Strathmeyer, *Living in Interesting Times—So What Else Is New?,* 29 CEB Est Plan Rep 37 (Oct. 2007); *A Power of Attorney for Estate Planning: Thoughts to Consider*, 23 CEB Est Plan Rep 62 (Dec. 2001). Note that a power of attorney to amend or revoke a trust must be given in both the trust and power of attorney documents. Prob C §§4264(a), 15401(c). For a detailed discussion of durable powers of attorney, see California Powers of Attorney and Health Care Directives (Cal CEB 2008).

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C. The Gross Estate

§3.28 1. In General

The gross estate of a U.S. citizen or resident for federal estate tax purposes is broadly defined to include all of the decedent's property, real or personal, tangible or intangible, wherever situated. IRC §2031(a). It includes all property in which the decedent had a beneficial interest at the time of death (to the extent of that interest). IRC §2033; Treas Reg §20.2033-1(a). Thus, the gross estate encompasses assets that would be subject to probate, as well as assets that would not be subject to probate, such as certain life insurance proceeds (see IRC §2042; §3.29), employer retirement plan benefits and annuities payable to the individual's survivors or estate (see IRC §2039), property subject to a general power of appointment (see IRC §2041; §3.30), and property interests held in joint tenancy (see IRC §2040; §3.31).

The gross estate also includes the value of certain lifetime transfers under IRC §§2035-2038, including:

- Transfers with retained interests (see IRC §§2036-2037; §3.32);
- Revocable transfers (see IRC §2038; §3.33); and
- Transfers made within 3 years before an individual's death (see IRC §2035; §3.34).

The gross estate also includes contingent claims arising before death. *Estate of Glover*, TC Memo 2002-186.

The attorney should determine whether the client has made any lifetime gifts in excess of the annual gift tax exclusion amount, because such gifts enter into the computation of the federal estate tax. The client's estate may also include all or part of the value of gifted property if the client has made an incomplete or partial gift (IRC §§2036, 2043(a)) as well as gift tax paid on gifts within 3 years before the date of death (IRC §2035(b)).

If the client has a deceased spouse, the client may be the beneficiary of a bypass trust or a marital deduction trust. When such a trust exists, the attorney should ascertain what powers the client has over trust assets and whether trusts have been properly segregated. Commingling trust assets can have unintended tax consequences. See, *e.g., Estate of Hester v U.S.* (WD Va 2007) 2007-1 USTC ¶60, 537, 99 AFTR2d 1288.

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§3.29 2. Proceeds of Life Insurance

The proceeds of an insurance policy on the decedent's life are included in the decedent's gross estate if the proceeds are receivable (IRC §2042):

- By or for the benefit of the decedent's estate; or
- By other beneficiaries, and the decedent had any incidents of ownership in the policy at death, such as the ability to change beneficiaries, to surrender or assign the policy, or to borrow against or pledge the policy.

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§3.30 3. Powers of Appointment

In general, the gross estate includes property over which a decedent had a general power of appointment. IRC §2041(a)(2). A general power of appointment is a power to appoint property to one or more of the decedent, the decedent's estate, the decedent's creditors, or the creditors of the decedent's estate. IRC §2041(b); Treas Reg §20.2041-1(c)(1). To be included in the gross estate, the power must either be possessed by the decedent at death or have been exercised or released by the decedent in a manner that would cause inclusion of the property subject to the power in his or her gross estate under IRC §§2035-2038. IRC §2041(a)(2). Possession of a general power at death suffices for inclusion of the subject property even if the powerholder lacks capacity to exercise the power. See *Fish v U.S.* (9th Cir 1970) 432 F2d 1278. Ignorance of the existence of the power also does not prevent inclusion. *Estate of James C. Freeman* (1976) 67 TC 202.

PRACTICE TIP: Unless there is a reason to do otherwise, the easiest way to avoid inadvertently giving a fiduciary a general power of appointment is to appoint someone who is not a potential beneficiary or to limit all dispositive powers held by the fiduciary so that the power is subject to an ascertainable standard.

A power that is limited by an ascertainable standard relating to the health, education, support, or maintenance of the holder is not a general power of appointment. IRC §2041(b)(1)(A); Treas Reg §20.2041-1(c)(2). Furthermore, a power is not a general power of appointment if it is exercisable only in conjunction with the creator of the power, or with someone having a substantial interest in the property that is adverse to the decedent. IRC §2041(b)(1)(C)(i)-(ii).

The creation of a general power of appointment may also have unintended income tax consequences. See §3.95.

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§3.31 4. Joint Interests

The gross estate includes the value of a decedent's interest in joint tenancy property. IRC §2040(a). To the extent that the property was acquired by the decedent and the other joint owner(s) by gift, devise, bequest, or inheritance, only the decedent's fractional share of the property is included. Treas Reg §20.2040-1(a)(1). In other cases, the decedent will be presumed to have furnished all the consideration for the jointly held property unless the executor can present evidence of the surviving joint owner's contributions. Treas Reg §20.2040-1(a)(2). Thus, joint property owners should keep records of their contributions. If the decedent made a gift to the other joint tenants of the consideration used to purchase the jointly owned asset, that consideration is attributable to the decedent for purposes of §2040(a). Treas Reg §20.2040-1(c).

In the case of a qualified joint interest, one-half of the value of the interest is includable in the decedent's estate. A "qualified joint interest" is an interest in property held by spouses as tenancy by the entirety or as joint tenants with right of survivorship (but only if the spouses are the only joint tenants). IRC §2040(b).

NOTE: Tenancies in common and community property interests are governed by IRC §2033.

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§3.32 5. Lifetime Transfers With Retained Interests

If the client has made lifetime gifts, the attorney should inquire about retained interests in, or powers over, the gifted property. The gross estate includes property that the individual has transferred to another during his or her lifetime if the individual retained certain interests or rights in the property for life or for a period not ascertainable without reference to, or that does not in fact end before, the decedent's death. IRC §2036.

An interest is treated as retained if, at the time of the transfer, there was an express or implied understanding that the interest or right would be reserved. IRC §2036(a); Treas Reg §20.2036-1. Retained interests also include a right to possession or enjoyment of, or a right to the income from, transferred property. IRC §2036(a)(1).

If an individual has the power, either alone or in conjunction with another person, to designate who will possess or enjoy, or have the right to income from, property transferred by the individual during his or her lifetime, the entire property will be included in the individual's estate, not merely the affected interest. IRC §2036(a)(2). The power to change the beneficiary of a qualified tuition plan is an exception to this rule. IRC §529(c)(4).

Retained interests commonly arise from reciprocal trusts and gifts of residences with a continued right of occupancy. Thus, in the typical situation where the client has transferred his or her home to a child in a do-it-yourself attempt to avoid probate, the value of the home may nonetheless be included in the client's estate. See, *e.g., Estate of Maxwell v Commissioner* (2d Cir 1993) 3 F3d 591; *Estate of Adrian K. Rapelje* (1979) 73 TC 82; *Estate of Timothy J. Tehan,* TC Memo 2005-128; *Estate of Eleanor T. R. Trotter,* TC Memo 2001-250.

Property transferred, in trust or otherwise, is included in the transferor's gross estate under IRC §2037(a) to the extent that:

- A transferee can possess or enjoy the property only by surviving the transferor (IRC §2037(a)(1)); and
- The transferor retained a reversionary interest in the property, the value of which is greater than 5 percent of the property immediately before the transferor's death (IRC §2037(a)(2)). "Reversionary interest" is defined to include the possibility that the property transferred by the decedent may return to the decedent or the decedent's estate or may be subject to a power of disposition by the decedent. IRC §2037(b). A reversionary interest may arise either under the express terms of a trust or by operation of law. Thus, the applicability of IRC §2037(a) is determined at the transferor's death.

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§3.33 6. Revocable Transfers

The gross estate includes the value of an interest in property transferred by a decedent, in trust or otherwise, when the decedent could change the enjoyment of the interest by exercising a power to alter, amend, revoke, or terminate the interest, or when the decedent relinquished any such power during the 3-year period ending on the date of the decedent's death. IRC §2038(a)(1). The power may be held by the decedent as a trustee.

As a consequence, property held in a revocable trust is included in the settlor's estate for estate tax purposes. The power may be held alone or in conjunction with third parties, even if the other party is adverse. However, IRC §2038 does not apply when an individual holds a power requiring the consent of all interested persons and the power adds nothing to the parties' rights under local law. Treas Reg §20.2038-1(a)(2). Further, IRC §2038 does not apply to transfers that are bona fide sales for full and adequate consideration in money or money's worth. Treas Reg §20.2038-1(a)(1). See *Estate of Daniel J. Harrison, Jr.,* TC Memo 1987-8.

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§3.34 7. Gifts Made Within 3 Years Before Death

The gross estate includes the value of any property transferred, or with respect to which a power was relinquished, by a decedent within 3 years before death if such property would have been included in the decedent's gross estate under IRC §2036 (transfers with retained life estate), §2037 (transfers taking effect at death), §2038 (revocable transfers), or §2042 (proceeds of life insurance) if the decedent had retained the property or power. IRC §2035(a). The gross estate is increased by the amount of any gift tax paid by the decedent or by the decedent's estate on any gift made by the decedent or the decedent's spouse within 3 years before the decedent's death. IRC §2035(b).

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§3.35 D. Deductions From Gross Estate

Certain amounts may be deducted from the value of the gross estate to determine the amount of the taxable estate. IRC §2051; see IRC §§2053-2058. Some types of expenses may also be deductible for income tax purposes, such as administrative expenses or casualty losses. See IRC §§2053-2054. Such expenses may not be deducted for both estate and income tax purposes. IRC §642(g).

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1. Estate Tax Marital Deduction (IRC §2056)

§3.36 a. Qualifying for the Deduction

An unlimited marital deduction is generally allowed for transfers from a decedent to the decedent's surviving spouse. IRC §2056(a). The transfer may be outright (see §3.37) or to a qualifying marital deduction trust (see §§3.38-3.40). For transfers to noncitizen spouses, the deduction is allowed only for property transferred to a qualified domestic trust. IRC §§2056(d), 2056A. See chap 5.

Although the IRS generally relies on state law for its definition of "spouse," federal law prohibits the IRS from relying on state law for its definition of spouse when that definition would treat same-sex individuals as spouses, although legally married under state law. In addition, the marital deduction does not apply to same-sex domestic partners treated as spouses under California law (see Fam C §297.5). See 1 USC §7.

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§3.37 (1) Outright Transfers

Outright transfers are convenient and often emotionally satisfying for the surviving spouse, who receives full power to use and dispose of the property in any manner. When the spouses' combined assets are less than the IRC §2010 estate tax applicable exclusion amount ($2 million per person in 2006 through 2008; $3.5 million in 2009) and when, based on the spouses' ages and the nature of their assets, it is unlikely that the combined estate will ever be larger than the applicable exclusion amount, an outright bequest to the surviving spouse may be appropriate. Note, however, that barring further legislative action, the estate tax applicable exclusion amount is scheduled to be lowered to $1 million after 2010.

When the combined estates of the spouses may or are likely to result in an estate tax at the survivor's death, however, the attorney should discuss the possible multi-trust options that would avoid this result. Another factor to consider is that outright transfers do not protect the deceased spouse's testamentary intent with regard to disposition of the estate on the death of the surviving spouse, nor do they protect the surviving spouse from claims of creditors. The significance of the decedent's lack of control over ultimate disposition depends on the spouses' circumstances, *e.g.,* whether their family life is harmonious, whether both intend to leave assets to their children after the survivor's death, and whether either spouse has children from a former marriage.

For advantages of a marital trust over an outright transfer, see §3.38.

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(2) Transfers to Qualifying Trusts

§3.38 (a) Survivor's Trust

A married couple's estate plan often includes a survivor's trust for the surviving spouse. The trust is typically funded with the surviving spouse's separate property, one-half share of the community property, and one-half share of any quasi-community property (*i.e.,* property that would have been community property if acquired by the spouses while domiciled in California (Prob C §66)). This is the survivor's, or nonmarital deduction, share of the survivor's trust. A survivor's trust, which is typically revocable by the survivor and thus functions as the survivor's own revocable trust, is intended to avoid the need for a probate at the death of the surviving spouse and to eliminate or minimize the need to appoint a conservator for the surviving spouse in the event of incapacity.

For a couple who have a combined estate that is greater than the current IRC §2010 estate tax applicable exclusion amount (*i.e.,* a combined estate of more than $2 million in 2007 and 2008; $3.5 million in 2009) or that is likely to exceed future applicable exclusion amounts, creation of two or three trusts at the first death may be appropriate. In that situation, the survivor's trust may be funded with some of the deceased spouse's property—the marital deduction share—while a second trust, usually a bypass trust, is created to hold the deceased spouse's property with a value equal to the estate tax exclusion amount that the decedent had remaining at his or her death. See §3.41.

A standard survivor's trust that contains a marital deduction share will not qualify for the marital deduction unless the survivor retains unlimited power to revoke or amend the trust (to satisfy the requirement that the surviving spouse have the right to a qualifying income interest for life), and is entitled to withdraw whatever he or she wishes (to satisfy the requirement of a general power of appointment). IRC §2056(b)(5). The trust may not provide that the surviving spouse's right of withdrawal ceases during his or her lifetime or in the event of a gift to a third party. For example, the trust must not provide that the spouse cannot make withdrawals if he or she becomes incapacitated.

The survivor's trust can be drafted to allow flexibility in postmortem planning by allowing a nonprorata distribution of community property in an estate plan requiring the establishment of subtrusts—*e.g.,* a survivor's trust, marital trust, and bypass trust—on the death of the first spouse to die. For example, it may be desirable to allocate both community property halves of the settlors' personal residence to the survivor's trust, with a balancing transfer of both community property halves of other assets, such as a securities account, to the bypass trust or marital trust, if any.

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§3.39 (b) Qualified Terminable Interest Property (QTIP) Trusts

Another type of trust that qualifies for the marital deduction is a qualified terminable interest property (QTIP) trust. A terminable interest is a property interest that is subject to termination because of the passage of time or because an event or contingency occurs or fails to occur. IRC §2056(b)(1). A bequest of a life estate, coupled with a remainder to anyone other than the surviving spouse, is ordinarily a gift of a nondeductible terminable interest. Statutory exceptions to the terminable interest rule include a QTIP trust.

To qualify for the marital deduction, a QTIP trust must provide that (IRC §2056(b)(*7*)(B)):

- All income from the trust be distributed to the surviving spouse at least annually; and
- The surviving spouse be able to demand that the trust property be converted to income-producing property.

In addition (IRC §2056(b)(*7*)(B)):

- No one—not even the surviving spouse—can have a power of appointment exercisable in favor of any person other than the surviving spouse during the surviving spouse's lifetime (*i.e.,* no portion of the trust principal may be distributed to any person other than the surviving spouse during the surviving spouse's lifetime); and
- The executor of the deceased spouse's estate must make a QTIP election when filing the deceased spouse's federal estate tax return.

A QTIP trust is often used in a second-marriage situation when one spouse (or both) has children from a previous marriage. It allows each spouse, if he or she is the first to die, to ensure the financial security of the surviving spouse, but also to guarantee that at the death of the surviving spouse, the deceased spouse's children will receive what remains of his or her assets. Even when all children are those of the deceased spouse and the surviving spouse, a QTIP trust can be drafted to require that the couple's assets pass to their children on the second death. Another feature of a QTIP trust is that the assets for which the executor makes the election are included in the surviving spouse's estate and are then eligible for a step-up in basis at the surviving spouse's death. See §3.100.

NOTE: A "reverse QTIP election" may be made to treat the deceased spouse as the transferor for purposes of the generation-skipping transfer (GST) tax, even after the trust is included in the estate of the surviving spouse.

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§3.40 (c) Life Income/General Power of Appointment Trust

Another trust that is an exception to the terminable interest rule is a life income/general power of appointment trust. Under IRC §2056(b)(5), a gift to the surviving spouse of a life income interest in property (or a specific portion of property) coupled with a general power of appointment qualifies for the marital deduction as follows:

- The life estate may be (but need not be) in trust;
- The life income interest must be payable at least annually;
- The general power of appointment must be exercisable in favor of the surviving spouse or the surviving spouse's estate and may be exercisable during life or on death; and
- No person other than the surviving spouse may have the power to appoint any part of the property interest to anyone other than the surviving spouse.

NOTE: There is no need for the executor to make an election to qualify for the marital deduction, as is required for a QTIP trust. See §3.39.

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§3.41 b. Use of Bypass and Disclaimer Trusts in Marital Deduction Planning

As a result of the unlimited marital deduction, it is possible to avoid paying estate tax on the death of the first spouse to die (deceased spouse). However, any property transferred to the spouse outright or to the marital deduction trust increases the value of property that will be subject to estate tax on the surviving spouse's death. Accordingly, it is generally desirable for the deceased spouse to transfer to the survivor or to the marital deduction trust no more property than is necessary to reduce the estate tax due on the first death to zero.

This raises the question of how to dispose of the residue of the deceased spouse's estate. If the deceased spouse is quite wealthy, the residue can be left directly to children or other selected beneficiaries. If the deceased spouse's assets are more modest, the surviving spouse might need, or at least desire, access to the residue. In this situation, standard estate planning provides for disposition of the residue to a bypass trust (also referred to as a credit shelter trust, credit trust, exemption trust, family trust, nonmarital trust, or B trust) (see §3.42) or, as an alternative, to a disclaimer trust (see §3.43).

For income tax considerations in funding and allocation of a pecuniary formula bequest, see §3.88.

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§3.42 (1) Bypass Trust

A bypass trust makes assets available for the survivor's use but does not give the survivor rights to them that would cause any undistributed trust property to be included in the survivor's taxable estate on his or her death; that is, the undistributed assets of the decedent's estate "bypass" the survivor's estate. The most common way of allocating assets to the bypass trust involves using a marital deduction formula clause (called a "zero-tax" formula) to divide the property of the deceased spouse between a marital deduction gift and a gift passing to the bypass trust. The purpose of a zero-tax formula is to determine either (1) the minimum amount or fraction of the deceased spouse's estate that will qualify for the marital deduction and result in no estate taxes on the deceased spouse's estate, or (2) the maximum amount or fraction of the deceased spouse's estate that is transmissible free of estate tax without regard to any marital deduction. See Drafting California Revocable Trusts, chap 11 (4th ed Cal CEB 2003).

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§3.43 (2) Disclaimer Trust

An alternative to a bypass trust is a disclaimer trust, which will be funded if the surviving settlor disclaims a transfer of property from the deceased settlor that would otherwise pass to the survivor or to a trust that is revocable by the survivor. Without an express provision for such a trust, any property disclaimed by the surviving settlor typically passes immediately to younger-generation beneficiaries—a fact that might discourage the survivor from making the disclaimer.

In some cases, a disclaimer trust may be used as a substitute for a marital deduction formula bypass trust. If so, the purpose of the trust is to use the deceased settlor's IRC §2010 estate tax applicable exclusion amount. In other cases, the disclaimer trust is used in addition to a regular bypass trust to divide the estates more evenly and, perhaps, to take advantage of the IRC §2013 estate tax credit for previously taxed property. This option can be particularly useful if it becomes obvious shortly after the death of the first spouse that the second spouse will soon die.

A valid disclaimer must be made within 9 months of the date of death of the deceased spouse and without accepting the benefits of the disclaimed property. IRC §2518. See Prob C §§260-295 for California laws concerning disclaimers.

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§3.44 (3) Planning Issues Regarding Bypass and Disclaimer Trusts

Using a marital deduction formula clause is the best method for creating a bypass trust if it is reasonably certain that the survivor's estate will owe estate tax. In some situations, however, it may result in the creation of a bypass trust that is either unnecessary or actually undesirable, because bypass trust property does not receive a new IRC §1014 income tax basis on the survivor's death. Planners must also consider the impact of the Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA-2001) (Pub L 107-16, 115 Stat 38). See §3.45.

The use of a disclaimer trust in lieu of a marital deduction formula bypass trust can be an attractive option when it is uncertain whether the value of the surviving settlor's assets will otherwise exceed the IRC §2010 estate tax applicable exclusion amount. Given the uncertainties of tax laws and variations in client wealth, it may be desirable to postpone issues concerning the size of the bypass trust until the first death.

In assessing the desirability of using a disclaimer trust, however, it is important to consider the risks, *e.g.,* that the survivor will fail to make an effective disclaimer within the IRC §2518(b)(2) time limit (particularly if the survivor is infirm or fails to seek immediate tax advice because it is obvious that no tax will be imposed on the deceased spouse's estate) or will inadvertently waive the right to disclaim by taking actions constituting an "acceptance" of the disclaimed property (see IRC §2518(b)(3)). See §3.43.

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§3.45 c. Effect of Uncertainty Under Current Tax Laws

Since the enactment of the Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA-2001) (Pub L 107-16, 115 Stat 38), with its increases in the applicable exclusion amount and scheduled estate tax repeal, the importance of a properly drafted zero-tax formula (see §3.42) has increased because of the potential for total estate tax avoidance.

Although it is expected that the federal estate tax will be extended into 2010, there is considerable uncertainty about the tax laws that will apply when each member of a married couple dies. See §3.27. Worse, strategies that produce the best results if the survivor's estate will be subject to estate tax can produce bad results if no estate tax will be owed on the survivor's death. Minimizing estate taxes on the survivor's death typically involves keeping property *out* of the survivor's estate, but making maximum use of opportunities for obtaining increases in income tax basis under current IRC §1014 or future IRC §1022 requires moving property *into* the survivor's estate. Planning is further complicated by the fact that QTIP property is considered part of the survivor's estate under §1014, but not under §1022.

Planners also confront uncertainty about the value of the property that will be allocated to the bypass trust and little certainty as to whether the original objective of a bypass trust—*i.e.,* keeping property out of the survivor's taxable estate—will remain a desirable objective. Consequently, planners must now design bypass trusts on a case-by-case basis, emphasizing strategies that provide the flexibility needed to modify plans in response to future changes in the law.

Strategies for maintaining flexibility in the initial value of the bypass trust, and before and after the first death, are discussed in Drafting California Revocable Trusts, chap 14 (4th ed Cal CEB 2003).

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2. Estate Tax Charitable Deduction (IRC §2055)

§3.46 a. Qualifying for Charitable Deduction

To qualify for an estate tax charitable deduction, an outright bequest to charity must meet the requirements of IRC §2055. Generally, that section restricts the deduction to gifts passing only to certain organizations and severely limits the form of any gift that is not for the charity's exclusive use, such as split-interest gifts. See §3.47.

Internal Revenue Code §2055(a) specifies that gifts to corporations organized or operated exclusively for religious, charitable, scientific, literary, or educational purposes qualify for an estate tax charitable deduction. The IRS periodically publishes a list of charities that have obtained a determination letter. See IRS Pub. 78 (Cumulative List of Organizations Described in Section 170(c) of the Internal Revenue Code of 1986). However, even charities listed in this publication can become disqualified. Generally, the IRS allows a deduction if the gift was made on or before the publication date of the Internal Revenue Bulletin announcing revocation of the charity's qualified status. For the IRS position on when organizations may rely on IRS Pub. 78, see Rev Proc 82-39, 1982-2 Cum Bull 759.

The amount of the charitable deduction must be ascertainable as of the date of the decedent's death. An indirect transfer to charity made through a fiduciary (the client's executor or trustee) with discretion to choose the charitable, religious, or educational organization(s) to receive the property may qualify for an estate tax charitable deduction if the distribution must clearly be made only to charities described in IRC §2055(a). See, *e.g., U.S. v Leonhardt* (MD Fla 1976) 76-1 USTC ¶13,138, 37 AFTR2d 1589; Rev Rul 69-285, 1969-1 Cum Bull 222.

PRACTICE TIP: The attorney should ascertain whether it is more important to the client to benefit a particular charitable organization or a nonspecific organization with a particular charitable purpose. In the former case, the client may prefer that a bequest to a named organization remain effective even if that organization does not qualify for the charitable deduction. In the latter case, the trustee or executor can be given discretion to select a replacement organization if the named organization no longer qualifies or has altered its operation in some essential way.

Note that special rules apply to deductions for works of art. IRC §2055(e)(4). For other gifts to organizations that qualify for the charitable deduction see IRC §2055(a).

PRACTICE TIP: The charitable beneficiary organization should be contacted regarding its correct name.

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§3.47 b. Split-Interest Charitable Bequests

A charitably minded donor may wish to establish a split-interest gift, *i.e.,* a gift that initially provides for distributions to one or more noncharitable beneficiaries, after which the balance of the property is distributed to a charity at some future time, frequently at the death of the last named noncharitable beneficiary. Rarely, a donor may wish to make a gift that benefits the charity first with the remainder passing to noncharitable beneficiaries.

The ability to claim a charitable deduction for these types of gifts is heavily regulated by statute. The general rule is that no deduction is allowed for the portion of a split-interest gift passing to a charity unless it comes within one of the exceptions specified in IRC §2055(e)(2) for gifts to qualified charitable remainder trusts, remainder interests in farms and residences, conservation easements, certain charitable lead trusts, and contributions of undivided shares of property.

WARNING: Overlooking the rules regarding split-interest charitable bequests or failing to carefully design a transaction in a way that will satisfy a statutory exception can be expensive for the client and raise malpractice issues for the drafter. Because of the general rule, tax advisers must be careful in structuring transactions that simply provide income interests to noncharitable beneficiaries, with the remainder to charity.

For a detailed discussion of split-interest gifts to charity, see California Estate Planning, chaps 23-24 (Cal CEB 2002).

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§3.48 3. Other Deductions

In addition to the marital and charitable deductions, several other deductions are allowed in computing the amount of the taxable estate. See IRC §§2053-2054, 2056A-2058. These deductions include:

- A reasonable amount for actually expended funeral expenses, as allowable by local law (IRC §2053; Treas Reg §§20.2053-1(c), 20.2053-2);
- Administrative expenses actually and necessarily incurred in administering the decedent's estate (Treas Reg §20.2053-3) (typically including fees of attorneys, accountants, appraisers, and fiduciaries);
- Amounts representing expenses incurred in administering property not subject to claims (generally property of an inter vivos trust) if they would have been allowed as deductions if the property being administered were subject to claims against the estate and were paid before the period of limitation for assessment expires under IRC §6501 (Treas Reg §20.2053-8);
- Enforceable claims against the decedent's estate that are the decedent's personal obligations existing at the date of death, whether or not then matured, and any interest accrued at the time of the decedent's death (IRC §2053(a)(3); Treas Reg §20.2053-4);
- Taxes accrued and enforceable as of a decedent's death (Treas Reg §20.2053-6);
- Unpaid subscriptions and charitable pledges (Treas Reg §20.2053-5);
- Liabilities imposed by law or arising out of torts (Treas Reg §20.2053-4);
- The full amount of an unpaid mortgage or any other indebtedness on any property of the gross estate (Treas Reg §20.2053-7);
- Casualty losses incurred during the settlement of the estate to the extent not compensated by insurance or otherwise (IRC §2054; Treas Reg §20.2054-1); and
- Estate, inheritance, legacy, or succession taxes paid to any state or the District of Columbia in respect of any property included in the gross estate (IRC §2058(a)).

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§3.49 E. Credits Against Estate Tax

A credit against the estate tax is allowed for gift tax paid on the decedent's lifetime transfers if the transferred property is included in the decedent's estate. IRC §2012. Inclusion of gifted property may occur if the decedent retained certain interests in the property under IRC §§2035-2038.

To provide relief from the imposition of estate taxes on deaths that occur in quick succession, IRC §2013 provides a credit for estate tax paid with respect to a transfer of property to the decedent by a transferor who died within 10 years before, or 2 years after, the decedent. The credit is 100 percent of the amount determined under IRC §2013(b) if the deaths occur within 2 years of each other, and the credit amount is reduced as the deaths occur further apart. IRC §2013(a).

PRACTICE TIP: In some cases, better tax savings may be achieved by using the IRC §2013 credit than by using the IRC §2056 marital deduction. If the surviving spouse is in poor health, it may be advisable to disclaim a portion of the marital deduction property under IRC §2518 to produce an estate tax so that the spouse's estate can receive the §2013 credit for property passing to the spouse, or the executor of the decedent's estate may choose not to make a qualified terminable interest property (QTIP) election under IRC §2056(b)(7) with respect to property in which the surviving spouse has a qualifying life income interest.

To remedy some of the effects of double taxation that may occur because the United States taxes a decedent's worldwide assets, a credit is allowed for foreign death taxes on property in the foreign country and included in the decedent's gross estate. IRC §2014.

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§3.49A F. Information Reporting After 2009

Following the repeal of the federal estate tax with respect to decedents dying after December 31, 2009, and before the reinstatement of the federal estate tax with respect to decedents dying after December 31, 2010, a federal estate information return will be required to be filed if the value of the decedent's assets at death, excluding cash, exceeds $1.3 million. The information required to be reported will include the date of death value and adjusted basis of the decedent's assets. IRC §6018, applicable to estates of decedents dying after December 31, 2009; IRC §1022(b)(2)(B).

NOTE: The estate information reporting requirements of IRC §6018 will not apply if the federal estate tax is extended into 2010.

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IV. GENERATION-SKIPPING TRANSFER TAX

§3.50 A. Overview

The generation-skipping transfer (GST) tax (IRC §§2601-2664) attempts to impose a transfer tax at each generation by imposing a tax when the estate and gift taxes fail to accomplish that objective. Examples include:

- When a gift is made from a grandparent to a grandchild, no tax is paid at the child's generation at the time of the gift. For GST tax purposes, the transaction is treated as a transfer to a child followed immediately by a gift from the child to the grandchild. The tax is imposed immediately. This taxable event is a "direct skip."
- When a trust is created for the benefit of a child for life, with the remainder to a grandchild, for GST tax purposes, the transaction is treated as a transfer to the child followed by a future transfer from the child to the grandchild at the child's death.
- When the child dies and the child's interest terminates, the tax is imposed. The taxable event is a "taxable termination."
- If any distributions are made to the grandchild while the child is still alive, the GST tax is imposed on the amount of the distribution at the time of the distribution. The taxable event is a "taxable distribution."

When a GST tax is imposed, it is imposed at the highest estate tax rate and is imposed in addition to the estate or gift taxes on transfers. See IRC §§2601, 2611, 2613. Accordingly, almost all GST tax planning is designed to avoid paying the tax. The primary device for not paying the tax is the GST tax exemption. Each individual is given a GST exemption equal to the applicable exclusion amount, which is $2 million in 2007 and 2008, and $3.5 million in 2009. IRC §§2631, 2010(c). Because of the GST tax exemption, the GST tax usually is relevant only in larger estates. There are rules for the automatic allocation of the exemption. However, often the GST tax exemption must affirmatively be allocated; it is not done automatically.

For a fuller treatment of the complex subject of the GST tax, see California Estate Planning, chap 11 (Cal CEB 2002).

NOTE: Like the estate tax, the GST tax is scheduled to be repealed with respect to the estates of decedents dying, and transfers occurring, after 2009, and to be reinstated after 2010. IRC §2664; Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA-2001), §901 (Pub L 107-16, §901, 115 Stat 38).

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§3.51 B. Expertise and Caution Required

The GST tax (IRC §§2601-2664) is extremely complex, particularly the provisions on the allocation of the GST exemption and the calculation of GST taxes due when a taxable event occurs. An estate in which the GST tax may be a factor cannot be considered simple. Because of the GST tax exemption, the GST tax is typically an issue only for estates that are large enough to be subject to the estate tax. However, GST tax issues can arise in a variety of situations, and a failure to identify and properly plan for those issues can have devastating results.

The attorney should at least be able to recognize situations in which the GST tax may be an issue. A failure to do so could preclude the timely allocation of an exemption on a tax return and result in the assessment of a significant GST tax. For larger estates, it is important to understand and properly apply the special rules governing the allocation of the GST exemption, because transfers made during a decedent's lifetime may, and likely will, affect the amount of the GST exemption available at death. If a client's estate planning raises significant GST tax issues, the attorney should consult with an estate planning expert.

For discussion of some specific GST tax planning mistakes, see §3.64.

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§3.52 C. The Key Elements

To determine whether there is a GST issue, the estate planner should know:

- How to identify the transferor and the transferee in order to determine whether their relationship is one that involves a generation skip;
- What is a taxable event and how the tax will be applied;
- Whether any exclusions apply; and
- The rules for calculating the tax and allocating the GST exemption.

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1. Identifying the GST Transferor and Transferee

§3.53 a. The Transferor

Generally, the GST tax "transferor" is the same person who made a transfer of the property for estate or gift tax purposes, whether or not any estate or gift tax was actually payable. IRC §2652(a). The "transferor" also includes a deceased beneficiary of a prior transfer who held a general power of appointment under IRC §2041; the spouse of a donor who consents to a split gift under IRC §2513 (Reg §26.2652-1(a)(5)); and the beneficiary spouse in the case of a transfer for which a QTIP election is made under IRC §2056(b)(7). See California Estate Planning, chaps 9-10 (Cal CEB 2002).

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b. The Transferee

§3.54 (1) Skip Persons and Nonskip Persons

Transfers to grandchildren are not the only kind of generation-skipping transfers. Any transfer to a "skip person" is a generation-skipping transfer. A skip person is any individual who is assigned to a generation that is two or more generations below the generation of the transferor. IRC §2613(a)(1). A trust is a skip person if all beneficiaries holding a present interest in the trust are skip persons or no person holds a present interest in the trust and no future distributions from the trust may be made to anyone other than skip persons. IRC §2613(a)(2); Treas Reg §26.2612-1(d)(2)(i).

A "nonskip" person is any person who is not a skip person. IRC §2613(b). Nonskip persons include the transferor's spouse (IRC §§2613, 2651(c)), any ancestor of the transferor (see IRC §§2613, 2651(b)), children of the transferor, and other relatives belonging to the same generation as the transferor's children, such as nieces and nephews of the transferor and the transferor's spouse (see IRC §§2613, 2651(b)). The transferor and the transferor's spouse are always treated as members of the same generation, regardless of the number of years between their ages. IRC §2651(c)(1). If at least one beneficiary of a trust holding a present interest is a nonskip person, the trust itself is treated as a nonskip person. IRC §2613.

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§3.55 (2) Generation Assignments

The IRC §2651 generation assignment rules used to determine whether a transfer is made to a skip person under IRC §2613 (see §3.54) are fairly straightforward:

- *Close relatives*. The generation assignments of close relatives (lineal descendants of grandparents of the transferor and the transferor's spouse or former spouse) are measured in the usual way. IRC §2651(b). Anyone who has at any time been married to the transferor or to a lineal descendant of the transferor's grandparent is assigned to the transferor's or lineal descendant's generation, respectively. IRC §2651(c).

- *Other persons*. Except in the case of close relatives, persons more than 12½ years younger than the transferor are assigned to the generation one level below the transferor; persons more than 37½ years younger are two generations below the transferor; and persons more than 62½ years younger are three generations below. IRC §2651(d). For rules that apply to adopted children, see Treas Reg §26.2651-2.

PRACTICE TIP: Age differences can be inadvertently and easily overlooked. Counsel should be aware of the generation assignment rules and always inquire about age differences when property is left to friends.

- *Charities*. Charities are assigned to the generation of the transferor. IRC §2651(f)(3).

- *Deceased ancestor rule*. Under IRC §2651(e), if a person is a descendant of a parent of the transferor (or the transferor's spouse or former spouse), and the parent of that person who is also such a descendant is dead at the time of a transfer, that person is reassigned to the generation of the deceased parent, and each descendant of that person also moves up one generation. However, this rule does not apply to nieces, nephews, or their descendants unless the transferor had no lineal descendants at the time of the transfer.

- *Expanded deceased ancestor rule*. A transfer will not be subject to GST tax if the transfer documentation or local law provides that the transferred property will pass to the transferor's grandchild if the transferor's child who is the parent of that grandchild fails to survive for a period of up to 90 days following the transfer. Treas Reg §26.2651-1(a)(2)(iii). (This rule also applies to descendants more remote than those of a child of the transferor. IRC §2651(e).) In addition, a *living* descendant will not be treated as deceased for GST tax purposes solely by reason of applicable local law, *e.g.,* because of a disclaimer. Treas Reg §26.2651-1(a)(2)(iv).

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§3.56 2. Determining the Type of Taxable Event

Once the transferor and transferee are identified, the question is whether the specific transfer falls within the definition of a taxable event for GST tax purposes. The statute defines three types of taxable events: direct skips, taxable terminations, and taxable distributions of generation-skipping trust property (IRC §2611(a)):

- *Direct skips* are transfers to skip persons, as defined in IRC §2613, on which GST taxes are imposed at the same time as the estate or gift tax because no nonskip person has a present interest in the transferred property at that time. IRC §2612(c). Examples of direct skips include direct gifts to grandchildren or to trusts benefiting only grandchildren.

- *Taxable distributions* are distributions or constructive distributions from a trust to a skip person. IRC §2612(b). For example, the lapse of a withdrawal power or other power of appointment may be treated as a taxable distribution. See Treas Reg §§26.2612-1(c)(1), 26.2652-1(a)(5), Example 5.

- *Taxable terminations* occur when there is any termination of an interest in a trust (whether by death, lapse of time, the release of a power, or otherwise), following which there are no nonskip beneficiaries who have an interest in the trust (in other words, when the interest of the last nonskip person terminates). IRC §2612(a).

The GST tax is imposed as soon as all persons having an interest in transferred property are skip persons. IRC §2613; Treas Reg §26.2612-1(e)(1). Thus, the tax is imposed immediately in the case of a gift or devise to a grandchild, but in the case of a trust that may make distributions to both skip persons and nonskip persons, the GST tax is delayed until the interests of the nonskip persons cease to exist.

NOTE: If a nonskip person holds a testamentary general power of appointment over his or her share of the trust, and the trust does not permit distributions to be made to skip persons during the lifetime of nonskip persons, the GST tax will never apply.

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§3.57 3. Calculating the GST Tax and Allocating the Exemption

After taking into consideration exclusions from GST tax (see §3.58), the GST tax is calculated by determining the "taxable amount" (see §3.59) and multiplying that amount by the "applicable rate." IRC §2602. The taxable amount is defined differently for each type of transfer, *i.e.,* direct skip, taxable distribution, and taxable termination; see IRC §§2621-2623.

The applicable rate, in turn, is determined by multiplying the highest estate tax rate for the year of transfer (see §3.60) by the inclusion ratio with respect to the transfer. IRC §2641(a).

The inclusion ratio is the mechanism by which the transferor allocates his or her GST exemption. See IRC §2642. The ratio is the excess, if any, of 1 minus the applicable fraction. The applicable fraction consists of a numerator that is the amount of GST tax exemption allocated to the GST and a denominator that is the value of the property being transferred less federal and state estate taxes and certain charitable deductions. IRC §2642(a). As long as the inclusion ratio is zero, the property transferred is exempt from the GST tax.

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§3.58 a. Exclusions

Gifts that qualify for the annual exclusion ($12,000 in 2008; $13,000 in 2009) per donor per donee per calendar year (IRC §2503(b)) are exempt from GST tax unless the transfer is to a trust having multiple beneficiaries. IRC §2642(c). Such a trust includes custodianships and IRC §2503(c) trusts for minors. See §3.18. Satisfying the single-beneficiary requirement necessarily means that the transfer must be a direct skip. IRC §2612(c).

WARNING: The planning significance of these rules is that there is no annual exclusion for GST purposes for certain types of trusts, including a *Crummey* trust with more than one beneficiary and the typical life insurance trust. For such trusts, if the trust in question is not a GST trust to which an automatic allocation of the GST exemption will be made, it will not be exempt from GST tax unless the transferor elects the automatic allocation by filing a gift tax return. See IRC §2632(c)(5); Treas Reg §26.2632-1(b)(2). Thus, it may be necessary to file a gift tax return for GST tax purposes even if the transfers are completely excluded for gift tax purposes.

The GST tax also is not imposed on payments of educational and medical expenses that would not be treated as taxable gifts under IRC §2503(e) if made by inter vivos gift. IRC §2611(b). See §3.15. Thus, the GST tax exclusion for such expenses is actually broader than the gift tax exclusion, because it applies not only to inter vivos gifts but also to trust distributions.

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§3.59 b. Determining the Taxable Amount

For a direct skip, the amount subject to GST tax is the value of property received by the transferee, excluding any estate or gift taxes paid in connection with the transfer. IRC §2623. See also IRC §§2515, 2642(b)(2)(A). Thus, only the net amount passing in the direct skip is subject to GST tax; the GST tax due on a direct skip is tax exclusive, meaning the GST tax itself is not included in the tax base. For this reason, paying GST tax during lifetime may, in some circumstances, reduce the overall transfer tax liability in the long term.

For a taxable distribution, the amount subject to GST tax is the full value (determined at the time of the distribution) of the property, reduced by any expenses incurred by the transferee in connection with the determination, collection, or refund of the GST tax due on that distribution (IRC §2621(a)), and increased by the amount of any GST tax paid out of the trust (IRC §2621(b)). The GST due on a taxable distribution is tax inclusive, meaning the GST tax itself is included in the amount on which the GST tax is imposed. For a taxable termination, the taxable amount is the value of property with respect to which the taxable termination has occurred (IRC §2622(a)), less certain allowable deductions (IRC §2622(b)). The GST tax due for a taxable termination is tax inclusive.

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§3.60 c. Maximum Estate Tax Rate

The GST tax is a flat tax, tied to the maximum estate tax rate. Under the Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA-2001) (Pub L 107-16, 115 Stat 38), the maximum estate tax rate is 46 percent in 2006 and 45 percent in 2007-2009. IRC §§2001, 2641. Absent further action by Congress and the President, the estate tax and GST tax are repealed with respect to the estates of individuals dying, and generation-skipping transfers occurring, in 2010, but in 2011 the $1 million estate tax applicable exclusion, the $1 million (indexed for inflation) GST tax exemption, and the 55-percent top tax rate will return.

NOTE: Although there is only one rate of GST tax at any particular time, the amount of the GST tax imposed varies with the type of transfer, because the method of computing the tax and the amount subject to the tax differ depending on the type of transfer (direct skip, taxable distribution, or taxable termination) and on whether the transfer is inter vivos or made at death. In cases involving direct skips, estate or gift taxes will be due in addition to GST tax. However, in cases involving taxable terminations and taxable distributions, only GST tax will be due.

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§3.61 d. Allocating the Exemption

Every individual is given a GST tax exemption. In 2004-2009, the GST tax exemption is equal to the applicable exclusion amount ($2 million in 2006-2008 and $3.5 million in 2009). IRC §2631. The GST tax does not apply to transfers in 2010. IRC §2664. After 2010, absent further action by Congress and the President, the amount of the exemption will return to $1 million plus cost-of-living adjustments.

The GST tax exemption functions differently from the applicable exclusion amount and corresponding applicable credit amount that ensure that no estate or gift tax is payable until an individual's transfers exceed the applicable exclusion amount, because any available applicable credit amount (for estate and gift tax purposes) is automatically applied to the earliest transfers. IRC §§2010, 2505. In contrast, use of GST tax exemption is discretionary. IRC §2632.

A transferor (or the transferor's fiduciary, if the transferor is deceased) is permitted to allocate as much of the exemption as he or she wishes to take with respect to any transfer. An individual may allocate his or her IRC §2631 GST tax exemption at any time on or before the due date for filing the individual's estate tax return. The allocation must be made on or before the filing due date of the estate tax return (with any extensions). IRC §2632(a)(1).

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§3.62 (1) Automatic Allocation Rules

Unless an election is made to avoid the deemed-allocation rules, a transferor's GST tax exemption is automatically allocated to direct skips made during life (IRC §2632(b)) and then to certain inter vivos indirect skips to GST trusts, as defined in IRC §2632(c). At death, any remaining exemption is allocated first to direct skips occurring at the individual's death and then to trusts with respect to which the individual was the transferor and from which a taxable termination or taxable distribution could occur at or after the individual's death. IRC §2632(e).

An individual may elect to avoid the automatic allocation rules for direct skips on a timely filed gift tax return. IRC §2632(b)(3). The automatic allocations to direct skips, and elections out of the automatic allocation rules, are irrevocable after the due date of the gift tax return. Treas Reg §26.2632-1(b)(1).

An individual may elect to opt into or opt out of the automatic allocation rules applicable to indirect skips on a timely filed gift tax return. IRC §2632(c)(5). See Treas Reg §26.2632-1(b)(2). Further, an individual may elect to treat inter vivos transfers to non-GST trusts as transfers to GST trusts. IRC §2632(c). The transferor or personal representative of the transferor's estate may allocate the GST tax exemption to any transfer made during life or at death to which automatic allocation does not apply. IRC §2632(a), (d).

PRACTICE TIP: For transfers after December 31, 2000, late allocations of GST tax exemption are retroactively effective to the date of the transfer under certain circumstances. IRC §2632(d). This may be particularly useful when deaths occur out of order, such as when a child dies before a parent.

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§3.63 (2) ETIP Exception to General Rules

The rules stated in §3.62 for allocating exemption to inter vivos transfers that are not direct skips are subject to an exception applicable to the estate tax inclusion period (ETIP). Under the ETIP rule, an allocation of the GST exemption is ordinarily not effective until the ETIP ends, and the valuation date for inclusion ratio purposes is similarly delayed.

The ETIP is the period after the actual transfer during which, should death occur, the value of the transferred property would be includable (other than by reason of IRC §2035) in the gross estate of the transferor or the transferor's spouse. IRC §2642(f). The ETIP rules apply to all retained-interest trusts, including qualified personal residence trusts (QPRTs). The ETIP rules also apply whenever a spouse is given a withdrawal power over a transfer to a trust, unless the amount subject to the power is no more than the greater of $5000 or 5 percent of the trust corpus, and the withdrawal right terminates no later than 60 days after the transfer to the trust. Treas Reg §26.2632-1(c)(2)(ii)(B).

If a trust is subject to an ETIP, the exemption allocation rules are ordinarily applied as if the transfer to the trust was made on the date that the ETIP ends. IRC §2642(f). Thus, it may be possible to make a timely exemption allocation many years after the transfer.

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§3.64 D. GST Tax Planning Mistakes

For estate planners, the most common GST tax planning mistakes are:

- Failure to allocate GST tax exemption to inter vivos trusts that might someday trigger a GST tax. Example: A transfer to a trust for a child for life, with property passing to a grandchild if the child fails to survive until a specified age. Attorneys counseling new clients should check to make sure that this problem has not already occurred. This is particularly important with respect to life insurance trusts, because once the policies mature, the value may exceed the available exemption.

- Failure to understand that the annual gift tax exclusion rules rarely apply for GST tax purposes and that gift tax returns may be needed for purposes of allocating the GST tax exemption, even if a gift tax return would not otherwise be required.

- Failure to allocate the GST tax exemption at the end of an ETIP (see §3.63).

In addition to the above, the attorney should exercise extreme care when engaging in transactions involving a client who has, or is a beneficiary of, a trust that became irrevocable before the effective date of the GST tax, *i.e.,* a so-called grandfathered trust. The current version of the GST tax was enacted as part of the Tax Reform Act of 1986 (TRA 1986) (Pub L 99-514, 100 Stat 2085). It included transition rules under which the GST tax is generally inapplicable to transfers made before October 22, 1986 (September 25, 1985, in the case of inter vivos transfers), and to some transfers that were revocable on the effective date but could not have been amended because the transferor was under a mental disability that continued until the date of his or her death. However, when additions or amendments are made to a grandfathered trust (or, in exceptional circumstances, when a limited (nongeneral) power of appointment has been exercised), the GST tax may apply.

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§3.65 V. CALIFORNIA ESTATE TAX

Before the enactment of the Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA-2001) (Pub L 107-16, 115 Stat 38), California had an estate tax equal to the maximum credit allowed against the federal estate tax for state death taxes. This type of tax is commonly referred to as a "pick-up" tax.

NOTE: Tax practitioners and the Internal Revenue Service refer to state estate, inheritance, legacy, or succession taxes as state death taxes. See, *e.g.,* IRC §2011. California previously imposed an inheritance tax and, before EGTRRA-2001 eliminated the federal credit, imposed a pick-up tax.

The pick-up tax had no effect on the aggregate amount of estate tax that was payable. Rather, a portion of tax was paid to California rather than to the United States Treasury. With EGTRRA-2001, however, the federal credit for state death taxes previously allowed by IRC §2011 was gradually phased out. Beginning with the estates of individuals dying in 2005, the federal credit for state death taxes has been eliminated entirely; there is no longer any estate or inheritance tax paid to the State of California. It is possible that California may impose an independent estate or inheritance tax at some time in the future.

Some states have estate or inheritance taxes that are imposed independently of the federal estate tax credit for state death taxes. Estate or inheritance taxes imposed by states other than California may be a factor when the client owns out-of-state real property, which is taxed in the state where it is located. For a detailed discussion the problems presented by of out-of-state real property, see chap 5. A federal estate tax deduction is allowed for state death taxes. IRC §2058.

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§3.66 VI. FOREIGN DEATH TAXES

Property located in another country may be subject to foreign death taxes. See Note in §3.65 for discussion of terminology. Foreign death taxes may apply not only to real property, but to assets such as cash in foreign bank accounts, securities, personal property, and retirement plans. If there is an estate tax treaty in effect with the country where assets are located, the treaty may specify which country may tax various assets. Foreign death taxes may apply to estates that are not large enough to be subject to U.S. estate taxes, so the practitioner should always ascertain whether the client has assets in a foreign country. Assets located in foreign countries may also be subject to probate proceedings there. In the case of a client whose estate plan would be simple if not for foreign assets, one possible solution is for the client to dispose of those assets during his or her lifetime. A federal estate tax credit is allowed for foreign death taxes. IRC §2014.

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§3.67 VII. CALIFORNIA REAL PROPERTY TAX

California real property taxes are often the most important tax consideration in planning estates that will not be subject to the federal estate tax. Because of the dramatic increases in the value of real estate in California, preserving the base-year value of property by avoiding reassessment is often an important goal for estate planning clients. When the planner describes the need to transfer the family residence to a revocable trust, the client invariably asks whether the transfer will result in a reassessment for property tax purposes. Occasionally, a client will have added another person's name to the title to real property in a do-it-yourself attempt to avoid probate without understanding the reassessment rules and possible unintended gift and income tax consequences.

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§3.68 A. Proposition 13: The Foundation

Article XIIIA of the California Constitution, generally referred to as Proposition 13, created the current California real property taxation system. Proposition 13 limits the maximum amount of the ad valorem tax on real property to 1 percent of the full cash value of the property. Cal Const art XIIIA, §1; Rev & T C §§110, 110.1, 110.5. It rolled back property tax values for tax purposes to the value on March 1, 1975, the assessment date for the 1975-1976 fiscal year (*i.e.*, the base-year value). Rev & T C §110.1. It restricts increases in the base-year value to an inflation factor of not more than 2 percent per year (Rev & T C §51(a)(1)(D)), and prohibits reassessment of the base-year value, except on a change in ownership (see §3.69), or completion of new construction. Cal Const art XIIIA, §2; Rev & T C §§50-51, 100, 110-110.1.

On a change in ownership, the base-year value of the property for tax purposes is reassessed at the fair market value at the time of the transfer. Rev & T C §60. When real estate is acquired by purchase, the price is generally considered to be the fair market value. 18 Cal Code Regs §2.

NOTE: In many areas, local taxes add substantially to the tax rate. See Rev & T C §93.

The change-in-ownership rules can create unexpected adverse effects with even commonly used estate planning techniques. An attorney handling any estate plan involving California real estate should be thoroughly familiar with the change-in-ownership rules and should advise the client of any adverse property tax consequences that may result from any recommended course of action.

The following sections are not intended to be a complete explanation of California's real property tax system; they focus primarily on the most commonly encountered provisions that affect small and mid-size estates.

For further discussion, see California Estate Planning, chap 15 (Cal CEB 2002).

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§3.69 B. Definition of Change in Ownership

Unless an exclusion applies, a change in ownership is any "transfer of a present interest in real property, including the beneficial use thereof, the value of which is substantially equal to the value of the fee interest." Rev & T C §60. The term is broadly interpreted to include transfers by gift, devise or inheritance, or any other means. The death of an owner of real property is a change in ownership on the date of death. See 18 Cal Code Regs §462.260(c). The transfer of a tenancy-in-common interest in real property and the creation, transfer, or termination of a joint tenancy interest in real property are changes in ownership of the interest transferred, unless an exclusion applies. Rev & T C §§61(e)-(f), 65(a).

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§3.70 C. Exclusions

Revenue and Taxation Code §§62-69.5 specify the transfers that are excluded from the definition of "change in ownership."

PRACTICE TIP: A transferee is required to notify the county assessor when there has been a change of ownership. A Preliminary Change of Ownership Report (PCOR) must be filed with a deed presented for recording. See §§12.54-12.57. Exclusions from reassessment are claimed on the PCOR. Some counties require additional forms for claiming specific exclusions.

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§3.71 1. Transfers Between Spouses and Registered Domestic Partners

There is a broad exclusion from reassessment for transfers between spouses (Cal Const art XIIIA, §2(g); Rev & T C §63) and transfers between registered domestic partners (Rev & T C §62(p) (effective January 1, 2006) (held valid by the court of appeal in *Strong v State Bd. of Equalization* (2007) 155 CA4th 1182, 66 CR3d 657); 18 Cal Code Regs §462.240(k)). Note that a domestic partner transferee whose property was reassessed between January 1, 2000, and January 1, 2006, may apply for a reversal of reassessment before July 1, 2009. Rev & T C §62(p)(2). The reversal of reassessment will not be retroactive, but will take effect on the lien date for the year in which the claim is filed. BOE Letter to Assessors No. 2007/043 (Nov. 16, 2007) (available on the State Board of Equalization's website at http://www.boe.ca.gov). The exclusion for transfers between spouses and between domestic partners applies both to transfers of interests in real property and transfers of interests in entities that own real property, including transfers through the medium of a trust.

NOTE: From July 1, 2003, through December 31, 2005, transfers of separate property inherited by a surviving domestic partner by intestate succession on the death of a registered domestic partner were exempted. 18 Cal Code Regs §462.240(k). The State Board of Equalization has also given informal advice that all transfers of property—not just separate property transfers—between registered domestic partners at death are exempt from reassessment despite the literal limitations of the regulation.

Under Rev & T C §63, transfers of interests in real property include joint tenancy transfers, receipt of the deceased spouse's or registered domestic partner's community property interest by the surviving spouse or registered domestic partner, a gift of a life estate, or transfers in connection with dissolution of a marriage or registered domestic partnership. Interspousal or registered domestic partner transfers also may include transfers of interests in legal entities. 18 Cal Code Regs §462.220.

Transfers through the medium of a trust require looking through the trust to determine the beneficial owner of the property. See §§3.72-3.74.

PRACTICE TIP: When an unmarried person wants to add the name of a partner who is not a registered domestic partner to title of real property as a joint tenant, there would be no reassessment. However, at the death of the original transferor, one-half of the property will be reassessed. Because this result is unavoidable, the estate planning attorney should make sure that the client contemplating the transfer understands the consequences.

CAUTION: Under proposed amendments to 18 Cal Code Regs §462.040(b), the entire property would be reassessed on the death of the original transferor. BOE Letter to Assessors No. 2007/010 (Feb. 23, 2007). See §3.75. However, the BOE has delayed the amendment process indefinitely. BOE Letter to Assessors No. 2007/025 (May 21, 2007).

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2. Trust Transfers

§3.72 a. Revocable Trusts

If title to property is held by a trust or is transferred to a trust, the change-in-ownership rules are applied on the basis of whether there are changes in the beneficial interests in the trust. For example, there is no change in ownership when a settlor (grantor) transfers property to the settlor's own revocable trust because, for property tax purposes, the present interest is not transferred. See Rev & T C §§62(d), 63(a); 18 Cal Code Regs §462.160(b)(5). Similarly, if the settlor-transferor revokes the trust, there is no change of ownership because the present interest is not transferred. 18 Cal Code Regs §462.160(d)(2).

However, at the death of the settlor-transferor, either (1) the trust terminates and the property is transferred to the remainder beneficiary, or (2) the trust continues but becomes irrevocable. In either case, there is a change in ownership subject to reassessment unless all the beneficiaries of the trust that has become irrevocable are persons who qualify for an exclusion, *e.g.*, a surviving spouse, registered domestic partner, or child. Rev & T C §§61(h), 63, 63.1; 18 Cal Code Regs §462.160(b)(2), (c).

NOTE: For property tax purposes, the trustee is never viewed as the "owner" of the trust property, even though the trustee has legal title and the power to sell. See 18 Cal Code Regs §§462.160, 462.240.

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§3.73 b. Irrevocable Trusts

When a settlor-transferor transfers real property to an irrevocable trust, a change in ownership occurs unless:

- The settlor-transferor retains the reversionary interest, and the beneficial interest of others does not exceed 12 years in duration. Rev & T C §62(d); 18 Cal Code Regs §462.160(b)(1)(B).
- The settlor-transferor is the sole present-interest beneficiary of the trust, *e.g.,* a qualified personal residence trust (QPRT). Rev & T C §62(d); 18 Cal Code Regs §462.160(b)(1)(A).

Property will not be reassessed if all present-interest beneficiaries are persons other than the settlor-transferor who qualify for an exclusion from change of ownership, *e.g.,* spouse, children, or eligible grandchildren. Rev & T C §§63, 63.1; 18 Cal Code Regs §462.160(b)(4). If some, but not all, present-interest beneficiaries qualify for an exclusion, and the trustee has no discretion regarding the shares to be distributed to each beneficiary, then only the shares of the beneficiaries not qualifying for an exclusion will be reassessed. 18 Cal Code Regs §462.160(b)(1)(A), Example 3.

When a trustee has discretion to distribute income and principal to a number of potential beneficiaries ("spray" or "sprinkle" trust), the property is subject to reassessment unless all potential beneficiaries have an available exclusion, because the trustee could potentially distribute income or principal to a nonexcludable beneficiary. 18 Cal Code Regs §462.160(b)(1)(A), Examples 1, 2.

WARNING: Even the broad exclusion for interspousal transfers has limitations. Often a bypass trust (see chap 7) will give the surviving spouse sprinkling powers in favor of the surviving spouse and issue. Transfers to the surviving spouse would fall within the interspousal exclusion (Rev & T C §63), but the trust may not qualify if "issue" includes grandchildren who have at least one living parent. 18 Cal Code Regs §462.160(b)(1)(A); BOE Property Tax Annotations Nos. 220.0774 (Dec. 14, 1993), 220.0821 (July 18, 2001), 625.0236 (July 22, 2002) (available on State Board of Equalization's website at http://www.boe.ca.gov).

As noted above, there is no change in ownership on the creation of and transfer of real property to a QPRT. Rev & T C §62(d). However, when the term expires (or at the death of the settlor-transferor before the expiration of the term if the property is transferred to the named beneficiaries rather than to the trustor-transferor's estate), there is a change in ownership of the real property, unless an exclusion applies. See 18 Cal Code Regs §462.160(c)-(d). On QPRTs, see chap 5.

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§3.74 c. Newly Acquired Trust Property in Bypass Trust

A bypass trust entails a possible trap, because the deceased spouse's parent-child exclusion applies only to property the deceased spouse owned at death. Rev & T C §63.1(c)(1). Thus, if a bypass trust buys new property during administration, the newly acquired property will qualify for a parent-child exclusion for purposes of the $1 million exclusion only on the death of the surviving spouse. For purposes of the parent-child exclusion, the date of death is presumed to be the date of transfer. If a trust acquires property after the date of death, then the property was never "owned" by the decedent during his or her lifetime. Even though the surviving spouse's parent-child exclusion may be applied to the transfer, the surviving spouse is considered the current beneficial owner of all newly acquired property (even though, for purposes of the estate tax, the newly acquired property will not be included in the surviving spouse's estate (see §3.42)). Consequently, the value of the newly acquired property combined with the surviving spouse's own property may exceed the surviving spouse's $1 million exclusion.

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§3.75 3. Joint Tenancy Transfers

WARNING: The Board of Equalization was considering amendments to 18 Cal Code Regs §462.040(b) that would significantly change the rules regarding transfers of joint tenancy interests. BOE Letter to Assessors No. 2007/010 (Feb. 23, 2007). However, the BOE has delayed the amendment process indefinitely. BOE Letter to Assessors No. 2007/025 (May 21, 2007).

A change in ownership includes the transfer of a joint tenancy interest from one owner to another owner on creation, transfer, or termination of a joint tenancy. Rev & T C §65(a). A newly created joint tenancy (*e.g., C* conveys to *A* and *B* as joint tenants) results in a change in ownership if *C* is not among the joint tenants. However, the creation or transfer of a joint tenancy interest (*e.g., C* conveys to *C* and *A* as joint tenants), including the transfer to a trust under 18 Cal Code Regs §462.040, is not a change of ownership if, after the creation or transfer of the joint tenancy interest, an original transferor is among the joint tenants. Rev & T C §65(b). *C* is an original transferor, but *A* does not become an original transferor.

Transfers between spouses qualify for the interspousal exclusion under Rev & T C §63. See §3.71. Accordingly, if the spouse of an original transferor is added as a joint tenant after the acquisition, the spouse becomes an original transferor. See 18 Cal Code Regs §462.040(b)(1), (5). It is not clear whether this would apply to domestic partners as well. Under proposed amendments, which have been indefinitely delayed (see Warning), the transferor spouse must remain on title in order for the transferee spouse to obtain original transferor status. Prop 18 Cal Code Regs §462.040(b)(1).

EXAMPLE: *A* and *B,* unrelated parties, own property as tenants in common and transfer the property to themselves as joint tenants. *A* and *B* are "original transferors." *A* and *B* transfer their joint tenancy interest to their respective trusts. *A*'s trust leaves the property to *B*; *B*'s trust leaves the property to *A*. *A* and *B* are still considered to be "original transferors." Result: No change in ownership on the first death. See BOE Letters to Assessors Nos. 2003/077 (Dec. 18, 2003) and 2004/042 (July 6, 2004). The regulations provide that joint tenancy interests may include interests in trusts. Accordingly, any joint tenant may become an original transferor by transferring his or her joint tenancy interest to the other joint tenants through his or her revocable trust, if the trust names the other joint tenants as current beneficiaries. 18 Cal Code Regs §462.040(b)(1). For further discussion, see 26 CEB Est Plan Rep 144 (Apr. 2005).

CAUTION: The proposed amendments to 18 Cal Code Regs §462.040(b)(1), which have been indefinitely delayed (see Warning), would eliminate the above-described provision regarding transfers by joint tenants to their revocable trusts.

On termination of a joint tenancy interest held by an original transferor, there is a change of ownership unless one of the transferees is an original transferor. Rev & T C §65(c). On termination of a joint tenancy interest held by a joint tenant other than an original transferor, there is no reassessment if the interest is transferred to an original transferor or to all remaining joint tenants, provided that one of the remaining joint tenants is an original transferor. Rev & T C §65(d).

EXAMPLE: *A* and *B* transfer their interest in Greenacre to *A, B,* and *C* as joint tenants. *C* is an unrelated third party. Result: No reassessment, because *A* and *B* are original transferors. *A* dies. Result: No reassessment, because *B* is a surviving joint tenant and is an original transferor. *B* then dies. Result: 100-percent reassessment because *C* is "other than an original transferor."

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4. Transfers Between Parents and Children

§3.76 a. Limited Exclusion

There is a limited exclusion from the definition of change in ownership for transfers between a parent and a child. Note that, unlike the exclusion for transfers to grandchildren (see §3.78), the parent-child exclusion applies to transfers from children to parents as well as from parents to children. The exclusion applies only to transfers of a principal residence of any value, plus up to $1 million ($2 million per couple) of the full cash value of property other than the principal residence. Cal Const art XIIIA, §2(a), (h); Rev & T C §§63.1, 110.1. "Full cash value" means the assessed value of the property at the time of the transfer, not the fair market value. Cal Const art XIIIA, §2(a); Rev & T C §§63.1(c)(5), 110.1.

PRACTICE TIP: When a donor parent (or child) has owned property with a low base-year value for a long time, or property values have appreciated faster than assessed values, the owner may transfer a great deal more than $1 million of fair market value property.

The definition of "child" includes a stepchild and the stepchild's spouse, until the marriage on which the relationship is based is terminated. The definition also includes a son- or daughter-in-law until the marriage on which the relationship is based is terminated. Rev & T C §63.1(c)(3). It is unclear whether this definition would include a child's registered domestic partner. With respect to transfers occurring after December 31, 2007, the definition of "child" includes a foster child of a state-licensed foster parent, if due to a legal barrier the child was not adopted by the foster parent before the child aged out of the foster care system. Rev & T C §63.1(c)(3)(E). See also BOE Letter to Assessors No. 2007/048 (Dec. 6, 2007).

Property transferred from a registered domestic partner to a child born to one of the partners during the registered domestic partnership is eligible for the parent-child exclusion, both before and after December 31, 2004, for property transferred by the birth parent or by the partner to a child legally adopted by the registered domestic partner of the birth parent. The child must have been under age 18 at the time of the adoption. After December 31, 2004, the parent-child exclusion is also available for a transfer from either domestic partner to a child born to one of them during the domestic partnership. BOE Letter to Assessors No. 2005/017 (Mar. 3, 2005). The child of a registered domestic partner born or adopted during the domestic partnership is considered the natural child of both partners. Fam C §§297.5, 7611; *Elisa B. v Superior Court* (2005) 37 C4th 108, 33 CR3d 46.

A claim for the exclusion must be filed within 3 years after the transfer or within 6 months after the mailing of a notice of supplemental or escape assessment, although a prospective claim for exclusion may be filed after these dates if the property has not been transferred to a third party. Rev & T C §63.1(e). See BOE Letter to Assessors No. 2008/018 (Feb. 29, 2008), Parent-Child Exclusion Q&A 44-51. Revenue and Taxation Code §63.1(j) provides for the imposition of a processing fee if a claim is untimely filed after notice by the county assessor of potential eligibility for the parent-child or grandparent-grandchild exclusion. See §§12.58-12.59 for form and discussion.

PRACTICE TIP: The attorney should contact the county assessor to find out whether the county assessor requires that certified birth certificates be filed with the claim for exclusion. The practice among counties is not uniform. Certified birth certificates may also be necessary for grandchildren's parents as well if the exclusion is claimed for transfers to grandchildren. See §3.78.

For examples of how poor estate planning can result in the loss of the parent-child exclusion, see §3.77.

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§3.77 b. Nonprorata Allocation Trap

Nonprorata allocation of property to children may result in reassessment. For example, parents may leave their estate in equal shares to their two children with the understanding that one child will buy out the other and live in the home. Because of the parent-child exclusion, the property will not be reassessed on distribution to the children. However, when one child subsequently purchases the interest of the other, no exclusion will be available (the parent-child exclusion does not apply to sibling transfers) and the share of the property purchased in the buyout will be reassessed. BOE Letter to Assessors No. 2008/018 (Feb. 29, 2008), Parent-Child Exclusion Q&A 37.

Probate Code §16246 allows nonprorata allocations unless prohibited by the governing instrument. If, as is usual, the will or trust permits nonprorata allocations and provides that each beneficiary shall receive an amount equal to the beneficiary's share of trust assets, the transfers in the above examples will be treated as direct transfers from parents to children and qualify for the exclusion. See 18 Cal Code Regs §462.160(d)(5); BOE Letters to Assessors Nos. 91/08 (Jan. 23, 1991) and 2008/018 (Feb. 29, 2008), Parent-Child Exclusion Q&A 35; BOE Property Tax Annotation No. 220.0767 (Aug. 6, 1990).

A problem frequently encountered in a small to mid-size estate is that the estate may not have many other assets apart from the residence. If nonprorata distributions are permitted, a trustee or executor may be well advised to mortgage the residence before distribution to provide enough cash to make nonprorata distributions among children and preserve the parent-child exclusion. See BOE Property Tax Annotations Nos. 625.0201 (Mar. 14, 2000) and 625.0235.005 (Aug. 4, 2003). If the trust instrument allows one child to purchase real property interests from his or her siblings, the interest purchased will not qualify for the parent-child exclusion; the purchase option would override a provision granting the trustee power to make nonprorata distributions of that property. See BOE Property Tax Annotation No. 625.0235.010 (Dec. 6, 2006). Note that a loan from the beneficiary to whom the property is distributed to the trustee would be treated as payment to the other beneficiaries, making the parent-child exclusion inapplicable. BOE Letter to Assessors No. 2008/018 (Feb. 29, 2008), Parent-Child Exclusion Q&A 36; BOE Property Tax Annotation No. 625.0235.005 (Aug. 4, 2003).

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§3.78 5. Transfers to Grandchildren

The exclusion for transfers from a grandparent to a grandchild is even more limited than the parent-child exclusion. A grandparent may transfer property to a grandchild without a reassessment, but only if all of the grandchild's parents who qualify as children of the grandparent are deceased as of the date of sale or transfer. For the lien date (January 1) beginning with fiscal year 2006-2007, a son-in-law or daughter-in-law of the grandparent who is the grandchild's stepparent need not be deceased for the transfer to qualify as an exclusion. Cal Const art XIIIA, §2(h); Rev & T C §63.1(a)(3), (c)(2). If the grandchild has already received a residence from a parent that was excluded under the parent-child exclusion, any principal residence must be considered "other real property" and counted against whatever is available from the grandchild's parent's $1 million exclusion. Rev & T C §63.1(a)(3)(B). See BOE Letter to Assessors No. 2008/018 (Feb. 29, 2008), Grandparent-Grandchild Exclusion Q&A 1-17. See also §§12.58, 12.60.

NOTE: The definition of "children" does not include a son-in-law or daughter-in-law whose marriage to the parent's child has been "terminated by divorce." When a daughter-in-law or son-in-law is a surviving spouse of a deceased child, the definition of "children" lasts only until remarriage. Rev & T C §63.1(c)(3).

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§3.79 6. Transfer of Tenancy-in-Common Interest

A tenancy in common is considered a legal entity. See Rev & T C §62(a)(2); §3.80. Although the transfer of a tenancy-in-common interest is generally a change in ownership (Rev & T C §61(f)), an exclusion applies if the transfer is only a change in the form of holding title without a change in the proportional interests of the beneficial owners. Rev & T C §62(a)(2). Furthermore, when a partial interest in real property, other than a joint tenancy interest, changes ownership, only that interest is reassessed. Rev & T C §65.1(a); 18 Cal Code Regs §462.020(a).

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7. Transfers Involving Legal Entities

§3.80 a. General Rules

Generally, the transfer of interests in real property between separate legal entities (*e.g.*, corporation, partnership, or limited liability company (LLC)) or between an individual and a legal entity (or vice versa) is a change in ownership. Rev & T C §61(j); 18 Cal Code Regs §462.180(a). However, a transfer to or from legal entities is excluded from the definition of "change in ownership" if the proportional ownership interests of the transferors and the transferees are exactly the same before and after the transfer. Rev & T C §62(a)(2); 18 Cal Code Regs §462.180(b)(2). Transfers of real property between or among affiliated corporations, including transfers used to achieve corporate reorganization, do not trigger reassessment. Rev & T C §64(b).

Transfers of ownership interests in entities holding real property generally are not changes in ownership. Rev & T C §64(a). However, if an individual or entity acquires control of the entity, there is a change of ownership of 100 percent of the real property owned by the entity. Rev & T C §64(c). Also, if the original co-owners transfer cumulatively more than 50 percent of the ownership interests in the entity, there is a change in ownership of 100 percent of the real property. Rev & T C §64(c). An owner is an "original co-owner" if the beneficial interest of that owner was acquired in a transaction that was excluded from a change in ownership because of the proportional-interest exception. Rev & T C §64(d).

Joint tenancy interests are discussed in §3.75; tenancy-in-common interests in §3.79.

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§3.81 b. Spousal and Parent-Child Exclusions When Entities Involved

As noted in §3.71, the spousal exclusion from change in ownership applies to transfers of interests in corporations, partnerships, and other legal entities that own real property. By contrast, the parent-child exclusion does not apply to transfers of partnership interests, shares of stock, or membership interests in LLCs. Rev & T C §63.1(c)(8). The exclusion is available for interests in trusts because trusts are not treated as legal entities. Rev & T C §63.1(c)(9). Interests in trust are discussed in §§3.72-3.73.

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VIII. INCOME TAX

§3.82 A. Personal Income Tax

A detailed discussion of personal income tax is beyond the scope of this book; however, some elements of personal income tax are often factors in planning the small to mid-size estate. These include capital gains tax and the exclusion for gain on sale of a principal residence (see §3.89), the "kiddie tax" (see §3.90), and charitable deductions (see §3.91). It is also important for the attorney to consider the concept of income in respect of a decedent when creating the estate plan.

WARNING: If income tax considerations are a significant factor in a client's estate plan, the attorney should consult with an estate planning attorney with tax expertise or with the client's income tax professional.

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§3.83 1. Capital Gains and Losses

In determining whether a client should dispose of assets during his or her lifetime, the attorney must consider the income tax consequences. When property is sold or exchanged, gain or loss is usually realized. IRC §1001(c). Gain or loss is the difference between the amount realized from the sale or exchange and the property's adjusted basis. IRC §1001(a). For discussion of basis, see §§3.98-3.108.

A transfer of property between spouses is not considered a sale or exchange. IRC §1041(a)-(b). Therefore, no gain or loss is recognized on a transfer of property from an individual to a spouse, or a former spouse if incident to divorce, unless the recipient spouse is a nonresident noncitizen. IRC §1041(a), (c)-(d). The recipient spouse's basis in the property is the same as the adjusted basis of the property in the hands of the transferor immediately before the transfer. IRC §1041(b). These nonrecognition rules apply to a transfer in trust for the benefit of a spouse, unless there are liabilities in excess of the property's adjusted basis. IRC §1041(e). Federal law precludes application of the nonrecognition rules to transfers between same-sex domestic partners. 1 USC §7.

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§3.84 a. Ordinary or Capital Assets

Gains and losses resulting from the sale or exchange of property are classified as either ordinary or capital, depending on the character of the asset involved. Almost all assets held for personal purposes or investment are capital assets. See IRC §1221. Examples include stocks and bonds, a personal residence, household furnishings, a personal automobile, coin or stamp collections, gems and jewelry, gold, silver, and other metals.

Noncapital assets include, among others (IRC §1221; Treas Reg §1.1221-1):

- Inventory and accounts or notes receivable acquired in the ordinary course of a trade or business for services rendered or from the sale of its products;
- Business supplies, depreciable property, and real property used in trade or business or as rental property; and
- Copyrights, literary, musical, or artistic compositions, letters, manuscripts, or photographs created by the owner's personal efforts. However, songwriters can elect capital gains treatment for the sale or exchange of musical compositions or copyrights. IRC §1221(b)(3).

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§3.85 b. Long-Term and Short-Term Capital Gains or Losses

Capital gains and losses are further classified as either short-term or long-term. If a capital asset has been held for 1 year or less, the gain or loss from its disposition is short-term. IRC §1222(1)-(2). Otherwise, the gain or loss is long-term. IRC §1222(3)-(4). Inherited property is treated as long-term regardless of how long it is actually held. IRC §1223(11).

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c. Tax Treatment

§3.86 (1) Capital Gain

For individuals, a net long-term capital gain is generally taxed at a lower tax rate than ordinary income. IRC §1(h)(1). It is defined as the excess of long-term capital gains over the long-term capital losses for a taxable year. IRC §1222(7). The favorable capital gains rates are currently scheduled to expire after 2010. The sunset provisions are in Pub L 108-27, §303, 117 Stat 764, Pub L 109-222, §102, 120 Stat 346.

NOTE: Gain recognized on the sale or exchange of depreciable property between related persons is taxed as ordinary income even if the property is a capital asset. For this purpose, "related persons" means (see IRC §1239):

- A person and all entities controlled by that person;
- A person and any trust in which that person or his or her spouse is a beneficiary (unless of a remote contingent interest); and
- An executor of an estate and a beneficiary of that estate (unless the sale or exchange is made to satisfy a pecuniary bequest).

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§3.87 (2) Capital Losses

Capital losses in excess of capital gains are deductible, subject to an annual limit of $3000 ($1500 if married and filing separately) and subject to limitations for certain kinds of capital losses. IRC §1211(b). Capital losses in excess of the annual limit may be carried forward and deducted in a future year, but they cannot be carried over after an individual's death. IRC §1212(b); Rev Rul *74*-175, *74*-1 Cum Bull 52. A carryover loss retains its original character as either long-term or short-term. IRC §1212(b)(1). The annual limit applies on a decedent's final income tax return. Rev Rul *74*-175, *74*-1 Cum Bull 52.

A loss on the sale or exchange of property between related persons is not deductible. IRC §267(a). For this purpose, related persons include (IRC §267(b)):

- Members of a family;
- A grantor and fiduciary, and the fiduciary and beneficiary, of any trust;
- Fiduciaries of two different trusts, and the fiduciary and beneficiary of two different trusts, if the same person is the grantor of both trusts; and
- An executor and a beneficiary of an estate (unless the sale or exchange is in satisfaction of a pecuniary bequest).

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§3.88 d. Income Tax Considerations in Funding and Allocation

If property that has appreciated since the date of death is used to satisfy a pecuniary bequest, the estate or decedent's trust will recognize a gain. This is the same result that would obtain if the property were sold and the proceeds used to satisfy the pecuniary bequest. Treas Reg §1.1014-4(a)(3). Probate Code §16246 gives the fiduciary the power to make either prorata or nonprorata distributions of the property. It is also customary to authorize prorata or nonprorata funding in the will or trust document. Absent this authority, the nonprorata allocation of various assets in satisfaction of fractional shares, which are always funded using date-of-distribution values, would result in taxable sales or exchanges.

The estate or decedent's trust will also recognize gain if appreciated property is used to fund a share, such as a credit shelter or marital deduction trust, under a pecuniary formula using date-of-distribution values. Treas Reg §1.1014-4(a)(3). See Rev Proc 64-19, 1964-1 Cum Bull 682, for two funding methods that the trustee must use if a trust allows a pecuniary marital deduction gift to be funded with noncash assets based on their federal estate tax values (usually date-of-death values). For further discussion, see Drafting California Revocable Trusts, chap 9 (4th ed Cal CEB 2003).

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§3.89 2. Sale of Personal Residence

An exclusion of $250,000 (or $500,000 for married couples filing jointly and qualified surviving spouses) applies to gain resulting from the sale of a personal residence. IRC §121(b)(1)-(2). For sales made after December 31, 2007, an unmarried surviving spouse who sells a residence within 2 years after the deceased spouse's death may exclude up to $500,000 of gain, provided that the ownership and occupancy requirements were met immediately before the deceased spouse's date of death. IRC §121(b)(4). To exclude gain, the individual generally must have owned and used the property as a principal residence for at least 2 years during the 5-year period ending on the date of sale. IRC §121(a). The 2 years of ownership and of use need not be continuous or concurrent. Treas Reg §1.121-1(c)(1). Short temporary absences for vacations or other reasons are counted as periods of use. Treas Reg §1.121-1(c)(2). The exclusion can be applied only to one sale or exchange every 2 years. IRC §121(b)(3). It does not apply to gains attributable to any part of the property used for business or to produce rental income unless it is within the home, such as a bedroom used as a home office for a business. Treas Reg §1.121-1(e). The exclusion does not apply to gain attributable to depreciation claimed after May 6, 1987. IRC §121(d)(6).

The $250,000 or $500,000 exclusion will be reduced on a prorata basis for any periods of nonqualified use after December 31, 2008, prior to occupancy as a principal residence. IRC §121(b)(4).

NOTE: Due to a legislative oversight, there are two subsections numbered IRC §121(b)(4). This one is the second of two, and may in future be redesignated as IRC §121(b)(5).

PRACTICE TIP: If the client needs or desires to sell property (*e.g.*, in order to live closer to family members or move to a retirement community), the exclusion makes the personal residence an attractive candidate for sale. If, however, the house has a market value significantly above its basis, it would be best for tax reasons to either sell the residence while the exclusion applies or else hold it until death.

There is an exception to the use test if, during the 5-year period before the sale, the individual has become physically or mentally unable to care for himself or herself, and has owned and actually lived in the residence for an aggregate total of at least 1 year. IRC §121(d)(7). Under this exception, the individual is considered to have lived in the residence during any time that he or she owns the residence but lives in a licensed care facility (including a nursing home). The 2-year ownership test must still be met.

NOTE: A reduced exclusion may apply in certain situations when the ownership and use requirements are not met but the sale is made for reasons of health, change in job location, or other unforeseen circumstances. IRC §121(c).

An individual may elect to exclude gain from the sale of a remainder interest in a residence, but if that election is made, the taxpayer may not exclude gain from the sale of any other interest in the home. IRC §121(d)(8)(A). Gain from the sale of a remainder interest in a home to a related person (including family members as well as certain corporations, partnerships, trusts, and exempt organizations) may not be excluded. IRC §121(d)(8)(B).

The exclusion may be claimed if the residence is owned by a grantor-type trust (see §3.94). Treas Reg §1.121-1(c)(3). No exclusion is available if the residence is owned by any trust whose beneficiary—even one who has an income interest and is living in the home—does not qualify as owner of the trust under the grantor trust rules. IRS Letter Ruling 200018021. See §3.95. For this reason, a client's personal residence should not be transferred to a bypass trust, if that can be avoided.

Loss on the sale of a personal residence is not deductible. Treas Reg §1.165-9(a).

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§3.90 3. The "Kiddie Tax"

The net unearned income of a child who is under the age of 19 at the end of the tax year (age 24 in the case of a student) and whose earned income does not exceed one-half of the amount of his or her support is taxed at the child's parent's highest marginal income tax rate when this produces a greater amount of tax than if the child were taxed at his or her own income tax rate. IRC §§1(g)(1)-(3), 152(c)(3). This tax is referred to as the "kiddie tax." Unearned income is income other than wages, salaries, and income from self-employment. See IRC §§1(g)(4)(A)(i), 911(d)(2). Net unearned income is unearned income reduced by the greater of (1) twice the standard deduction amount for a dependent child, or (2) the standard deduction amount for a dependent child plus the total amount of the child's itemized deductions that are attributable to the child's unearned income. IRC §1(g)(4)(A). For tax year 2009, the reduction under alternative (1) is $1900. Rev Proc 2008-66, 2008-45 Int Rev Bull 1107.

Distributions from certain nongrantor qualified disability trusts are considered earned income and thus exempt from the kiddie tax. IRC §1(g)(4)(C).

PRACTICE TIP: The kiddie tax is an important factor in deciding how to structure gifts and bequests to children and students. Because the kiddie tax has the effect of taxing children at their parents' highest marginal income tax rate, gifts and bequests of income-producing assets may result in undesired income tax consequences. A client wishing to benefit a child should consider using a tax-sheltered college savings plan (see §3.20) or a trust for the child funded with temporarily low-income-producing assets. See Drafting California Irrevocable Trusts §3.20 (3d ed Cal CEB 1997).

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§3.91 4. Charitable Deduction

Contributions to charity are deductible only if made to a qualified organization. IRC §170(a)-(c). Internal Revenue Code §170(c) specifies types of organizations that can be qualified organizations, including governmental units and religious, charitable, educational, scientific, and literary organizations. Qualified organizations are listed in IRS Pub 78, Cumulative List of Organizations Described in IRC §170(c), available on the IRS website at http://www.irs.gov/charities. California will recognize an organization's federal tax-exempt status. Rev & T C §23701d(c).

If property with a fair market value that is less than the donor's basis is contributed, the deduction is limited to fair market value. If ordinary income or business property with a fair market value that is more than the donor's basis is contributed, the deduction is generally limited to basis. A similar limitation applies to some capital gain property. IRC §170(e)(1). An important exception applies to contributions of publicly traded stock. IRC §170(e)(5).

The charitable deduction is generally limited to 50 percent of the donor's adjusted gross income, but in some cases 20-percent and 30-percent limits may apply. IRC §170(b). In addition, the total of an individual's itemized deductions may be limited. IRC §68.

Contributions that cannot be deducted because of one of the adjusted gross income limitations may be carried forward for 5 years. IRC §170(d)(1). A deceased spouse's carryover from an earlier year can only be used on a separate return filed for the deceased spouse, which is necessarily going to end on the date of death, or on a joint return for the year of death. Treas Reg §1.170A-10(d)(4)(iii).

For further discussion of taxation of charitable gifts, see California Estate Planning, chap 23 (Cal CEB 2002).

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§3.92 5. Income in Respect of a Decedent

Most property received by gift, bequest, devise, or inheritance, including life insurance proceeds payable by reason of the insured's death, is not taxed as income to the recipient. IRC §§101(a), 102(a). However, assets that are considered "income in respect of a decedent" (IRD) are an exception to this rule.

Nearly all individuals are cash-basis taxpayers, reporting income when received and claiming deductions for expenses when paid. A deceased individual's gross estate for federal estate tax purposes, however, is computed on the accrual basis. It includes amounts that the decedent was entitled to receive, but had not yet received, as of the date of death. IRC §691(a)(1). These receivables, IRD, have not been subjected to income tax before death. They are therefore subject to income tax when received, regardless of whether a federal estate tax return is required. IRD has the same character (*e.g.,* as ordinary income or capital gain) that it would have had if it had been received by the decedent while living. IRC §691(a)(3). Common examples include retirement plan benefits, payments under an installment sale contract, or interest on a debt owed the decedent.

PRACTICE TIP: In many small and mid-size estates, retirement plan benefits may be one of the client's largest assets. Because IRD assets are subject to income tax in the hands of the recipient beneficiary, nonspousal beneficiaries of large retirement plans have often had to pay a large percentage of the benefits in income taxes. For estate planning purposes, retirement benefits are a good choice for a bequest to a charitable organization, which is exempt from income tax, or to a low-income individual. For discussion of planning options, including options under the Pension Protection Act of 2006 (Pub L 109-280, 120 Stat 780) as well as warnings for estate planners whose clients have significant retirement benefits, see §§6.20-6.24.

For federal estate tax purposes, allowable deductions include debts not yet paid as of the date of death. If deductible for income tax purposes, these expenses may be claimed as deductions when paid. IRC §691(b).

An income tax deduction is allowed for federal estate tax attributable to IRD. IRC §691(c). Individual taxpayers claim this as a miscellaneous itemized deduction, which is not limited to 2 percent of adjusted gross income under IRC §67.

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§3.93 B. Fiduciary Income Tax

For federal income tax purposes, trusts are classified as "grantor" or "nongrantor" trusts. Grantor trusts are not taxed as entities separate and apart from the settlor and beneficiaries. Estates and nongrantor trusts are taxed as separate entities.

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§3.94 1. Grantor Trusts

During the period that a trust is revocable, the trust property is treated as "owned" by the settlor for income tax purposes. IRC §§671, 676. A trust that is taxed under §671 is often referred to as a "grantor trust." The settlor computes his or her taxable income by taking into account the income, deductions, and credits attributable to the trust. Essentially, the settlor is taxed as if "the trust had not been in existence." Treas Reg §1.671-3(a)(1).

The death of a settlor generally terminates grantor trust status as to the property of that settlor. See Rev Rul 75-267, 1975-2 Cum Bull 254. If a surviving spouse or domestic partner acquires the right to unilaterally withdraw the property of the deceased spouse or partner, the income from that property may be taxed to the surviving spouse or partner under the grantor trust rules. IRC §§671, 678.

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§3.95 a. Person Other Than Grantor Treated as Owner

Under IRC §678, a surviving settlor or other beneficiary may be deemed the owner of trust property for income tax purposes, and therefore taxed on the income derived from the property, regardless of whether the income is actually distributed to the beneficiary. The statute applies when a beneficiary has (or previously had) a unilateral withdrawal right.

A person who has the power, exercisable alone, to vest trust principal or income in himself or herself is treated as the owner of the portion of the trust subject to the power. IRC §678(a)(1); Treas Reg §1.678(a)-1(a). If the trustee-beneficiary also has the power to withdraw principal, he or she will be treated as the owner of the entire trust. See, *e.g.*, *Ella E. Russell* (1941) 45 BTA 397. The powerholder also may be treated as the owner if he or she releases the power. IRC §678(a)(2).

Another, perhaps more common, example of the right to take corpus or income is that of a trust beneficiary who has the right to withdraw the greater of $5000 or 5 percent of the trust assets each year. In this situation, the beneficiary is treated as owning a fractional portion of the trust's income and corpus. Rev Rul 67-241, 1967-2 Cum Bull 225. If a beneficiary has the right to withdraw all or some lesser part of the trust, as often occurs with marital deduction power of appointment trusts (IRC §2056(b)(5); Treas Reg §20.2056(b)-5), the beneficiary will be treated as the owner of the entire trust or of the lesser portion subject to that power. See *Emery v Commissioner* (1st Cir 1946) 156 F2d 728, cert denied (1946) 329 US 772 (beneficiary with power to revoke, alter, or amend trust is taxable on trust income).

Ownership under IRC §678 can be avoided (assuming that that result is desired) by having another person act with the holder (*i.e.*, a joint holder of the power). Rev Rul 67-268, 1967-2 Cum Bull 226 (cotrustee with power to take income not owner under IRC §678). This will be true even if the power holder is a minor (Rev Rul 81-6, 1981-1 Cum Bull 385) or if the income cannot be withdrawn until the end of the calendar year (see, *e.g.*, *Grant v Commissioner* (5th Cir 1949) 174 F2d 891).

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§3.96 b. Support Obligations

If a person, other than a grantor, holds a fiduciary power (as trustee or cotrustee) to apply trust income for the support of someone whom the person is obligated to support, the person is treated as an owner only to the extent that support distributions are actually made. IRC §678(c); Treas Reg §1.678(c)-1(a). If distributions that satisfy the support obligation are made from accumulated income or corpus, the trustee-power-holder is not treated as an owner but as a beneficiary. If a person, other than a grantor, holds a nonfiduciary power to apply the income or principal of a trust for the support of someone whom the person is obligated to support, the person is treated as an owner of the portion of the trust subject to the power. Treas Reg §1.678(c)-1(b). Internal Revenue Code §678 does not apply to income that is required to be distributed in support of a person's dependents; those distributions are taxable to the obligor as if the obligor were a beneficiary. Treas Reg §§1.662(a)-4, 1.678(c)-1(c).

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§3.97 2. Estates and Nongrantor Trusts

The Internal Revenue Code applies the same formula to the taxation of estates and nongrantor trusts that it applies to individuals: Gross income minus allowable deductions equals taxable income. See IRC §§63(a), 641(b); Treas Reg §1.641(a)-2, (b)-1.

Internal Revenue Code §1(e) imposes steeply graduated rates on the income of trusts and estates, which has the practical effect of encouraging distribution of income and discouraging accumulation of income and the creation of multiple trusts for tax avoidance purposes. The statutory rates are adjusted annually for inflation. The rates for taxable year 2009 are as follows (Rev Proc 2008-66, 2008-45 Int Rev Bull 1107):

Income Tax Rates for 2009
15 percent of the first $2300 of taxable income
25 percent of the next $3050 of taxable income
28 percent of the next $2850 of taxable income
33 percent of the next $2950 of taxable income
35 percent of the amount exceeding $11,150

Estates and trusts are allowed a deduction for distributions of income to beneficiaries, who are taxed on their distributive shares. IRC §§651, 661.

In general, estates are allowed a personal exemption of $600 in lieu of the larger personal exemption allowed individual taxpayers. IRC §642(b)(1). Nongrantor trusts are allowed $100 or $300, depending on whether they are required to distribute all income currently. IRC §642(b)(2). A qualified disability trust, however, is allowed the same exemption as an unmarried individual. A disability trust is one designed to provide financial assistance to a disabled beneficiary, while preserving the beneficiary's eligibility for medical benefits under the Social Security Act (42 USC §§401-1397jj). The trust must be one described in 42 USC §1396p, and all of the beneficiaries must have been determined by the Commissioner of Social Security to have been disabled. IRC §642(b)(2)(C). Distributions from a qualified disability trust are not subject to the "kiddie tax" (see §3.90).

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IX. BASIS

§3.98 A. Introduction

An important factor in planning for transfers of property, whether at death or during lifetime, is the income tax basis that the property will have in the hands of the transferee. That basis will establish the gain or loss that the transferee will realize on a subsequent sale or other disposition of the property. In some circumstances, basis considerations will be crucial to the discussion of whether to transfer an asset during lifetime or at death.

The basis of tangible real and personal property acquired by purchase is generally its cost. Adjustments to the basis of real property include increases for the cost of subsequent improvements and decreases for any depreciation claimed for income tax purposes. The basis of securities is increased by the purchase commission.

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§3.99 B. Basis Rules for Transfers at Death

For estates of decedents dying in years in which federal estate taxes are imposed, the basis of property acquired from a decedent is generally the fair market value of that property on the date of the decedent's death or alternate valuation date if elected. IRC §1014(a)(1)-(2). Note that basis will be determined by the date of death value even if the decedent's estate is not large enough to require filing a federal estate tax return. The alternate valuation date is 6 months after the date of death and may be elected only if it results in a lower estate tax than would be applied if using the date-of-death value. IRC §2032. If an election is made to apply special use valuation under IRC §2032A, the basis of the property will be its value as determined under that section. IRC §1014(a)(3). See chap 5.

When the fair market value of the property at the date of death is greater than its basis in the hands of the decedent, the result will be a "stepped-up" basis. Conversely, a fair market value less than the decedent's basis causes a "step down" in basis at the date of death.

The categories of property that are treated as acquired or passing from a decedent are enumerated in IRC §1014(b). For example, "property acquired by bequest, devise, or inheritance, or by the decedent's estate from the decedent" qualifies as passing from the decedent. IRC §1014(b).

In general, California's rules on adjustments to the tax basis of property acquired from a decedent parallel the federal provisions. With only minor exceptions, IRC §1014 has been incorporated by reference in California. Rev & T C §18031. The exceptions pertain to basis in certain foreign personal holding company stock and stock in a domestic international sales corporation (DISC) acquired from a decedent. Rev & T C §17024.5(b).

Note that in 2010, when the federal estate tax is scheduled to be repealed, basis will no longer be determined by date of death value. See §3.108.

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§3.100 1. Property of Surviving Spouse or Domestic Partner

Listed among the categories of property treated as acquired or passing from a decedent are community property of a surviving spouse and property includable in the surviving spouse's gross estate under IRC §2044, *i.e.,* property for which a marital deduction was previously allowed. IRC §1014(b)(6), (10).

A same-sex surviving spouse or domestic partner's interest in community property is not eligible for a step-up in basis for federal income tax purposes, because the survivor is not considered a surviving spouse under federal law. Although the IRS generally relies on state law for its definition of "spouse," federal law prohibits the IRS from relying on state law for its definition of spouse when that definition would treat same-sex individuals as spouses. 1 USC §7.

NOTE: It is unclear whether 1 USC §7 also would prohibit the IRS from treating *opposite-sex* domestic partners as spouses. Domestic partnerships for opposite-sex partners are permitted by Fam C §297 if one partner meets the eligibility criteria for Social Security benefits under 42 USC §402(a). Arguably, such a partnership could qualify to allow the partners to be treated as spouses for income and estate tax purposes, even if federal law also allows the partners to be treated as unmarried for Social Security purposes, as clearly intended by the statute. However, the community property of same-sex and opposite-sex surviving domestic partners should be entitled to a step-up in basis for California income tax purposes. See Fam C §297.5(e).

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§3.101 2. Exceptions to Basis Adjustment Rule

Several types of property are not subject to the basis adjustment rule of IRC §1014. Transferees of these types of property inherit the same basis that the property had in the hands of the decedent.

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§3.102 a. Income in Respect of Decedent (IRD)

Assuming that income in respect of a decedent (IRD) property is not distributed in satisfaction of a beneficiary's right to a specific dollar amount, the basis of IRD property in the hands of its eventual recipient is the same as the decedent's basis. IRC §1014(c). For property on which no income tax has been previously paid, such as distributions from IRAs or qualified retirement plans, this rule ordinarily results in a zero basis for income tax purposes. For installment obligations, the amount by which the face value of the obligation exceeds its basis in the hands of the decedent is IRD, and for purposes of calculating gain or loss on the payments, the transferees will include in gross income the same proportion of any payment received as the decedent would have included if he or she had received the payment. Treas Reg §1.691(a)-5(a).

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§3.103 b. Appreciated Property Acquired by Gift

If appreciated property is acquired by a decedent by gift within 1 year before death and that property passes on the decedent's death, directly or indirectly, to the donor or the donor's spouse, no basis adjustment is permitted. The basis of the property is its basis in the hands of the decedent immediately before death. IRC §1014(e). This rule prevents a donor from obtaining a stepped-up basis by transferring appreciated property to a terminally ill donee and then inheriting the property from the donee at his or her death. It is uncertain whether IRC §1014(e) would preclude a basis adjustment for assets that a surviving spouse had transmuted from separate to community property within 1 year before the donee spouse's death. Equally unclear is whether the problem would be resolved by transfer of the property on the death of the donee spouse to a QTIP or other trust for the benefit of the surviving spouse.

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§3.104 3. Application of Basis Rule to Particular Forms of Ownership

Joint Tenancy. The decedent's interest in joint tenancy property included in the decedent's gross estate receives a new basis at the time of the decedent's death. IRC §1014(b)(9). If the joint tenancy is a qualified joint interest between spouses, only half the interest is included in the decedent's estate. IRC §2040(b). The basis adjustment is then limited to the decedent's one-half interest. The §2040(b) rule does not apply if one of the spouses is a noncitizen. IRC §2056(d)(1)(B). This rule also does not apply to same-sex domestic partners treated as spouses under California law.

Community Property. Both halves of property held by spouses as community property receive a step-up in basis at the death of the first spouse. The surviving spouse's one-half interest in the community property is regarded as property acquired from the decedent and is therefore eligible for the adjustment. IRC §1014(b)(6). However, this rule does not apply to same-sex domestic partners treated as spouses under California law.

Community Property With Right of Survivorship. Civil Code §682.1 authorizes creation of community property with right of survivorship. The interest of the deceased spouse or registered domestic partner can be terminated by affidavit after the death of that spouse or partner. The basis step-up available for both halves of community property under federal law (IRC §1014(b)(6)) is preserved for spouses, but is not available to domestic partners. Although CC §682.1 does not apply to accounts in banks or other financial institutions, functionally the same form of title is created under the Uniform TOD Security Registration Act (Prob C §§5500-5512). The Act allows securities and securities accounts to be registered as community property, with ownership to pass on death to designated beneficiaries. Prob C §5502. The IRS has not definitively stated that community property with right of survivorship will qualify for the basis adjustment under IRC §1014(b)(6). Other community property states (Nevada, Arizona) have had similar statutes, and the IRS appears not to have raised any challenges to the basis issue in those jurisdictions. However, the basis adjustment will not apply to community property of same-sex domestic partners treated as spouses under California law.

Tenancy in Common. To the extent that the cotenant's interest is includable in his or her gross estate at death, that interest is eligible for a basis adjustment under IRC §1014. However, to the extent that a surviving spouse can prove a transmutation of the property to community property, IRC §1014(b)(6) would allow an adjustment in the basis of the entire property on the death of the first spouse, although this rule does not apply to same-sex domestic partners treated as spouses under California law. For transmutation requirements, see chap 12.

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§3.105 4. Problems and Planning Considerations

Basis issues can become a problem when an estate plan provides for distributions of pecuniary amounts from a trust at the death of the settlor. If property must be sold in order to provide the cash for making distributions, the trust may be forced to recognize a gain. Similarly, distributions of property in kind to satisfy the pecuniary obligation will also result in a forced recognition of gain. See Rev Rul 66-207, 1966-2 Cum Bull 243. For income tax considerations in funding and allocation in satisfaction of a pecuniary bequest, see §3.88.

The fact that property receives a stepped-up basis at death is usually a reason to consider reserving appreciated property for transfer at death rather than by inter vivos gift. This strategy permits the transferee of the property to avoid income tax on the appreciation at the time of a subsequent sale. However, as discussed below, there are circumstances in which a lifetime transfer of appreciated property to a donee in a lower income tax bracket may be appropriate. See §3.107. The income tax exclusion of gain on the sale of a personal residence may be a factor in determining which assets to sell if it is necessary to dispose of property during the client's lifetime. See §3.89.

NOTE: Property acquired from a decedent receives a new basis under these rules even when the estate is not required to file a federal estate tax return. Thus, basis considerations may be an important factor in planning the smaller estate.

The opportunity to obtain a new basis for both halves of community property can be extremely valuable when a couple owns appreciated assets, and the planner must exercise care to protect it. Frequently, property held by married couples as joint tenants should be retitled as "community property" or "community property with right of survivorship." See chap 12.

If the property has depreciated so significantly in value that the owner's basis is greater than the fair market value, it may be sensible for the property to be sold before death so the loss can be realized. This assumes that the owner can benefit from the recognition of the loss, perhaps using it to offset current capital gains. If the property is transferred at death, the basis will be stepped down to the fair market value, and any opportunity for recognition of the loss will be eliminated.

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C. Basis Rules for Transfers During Lifetime

§3.106 1. Donee's Basis Same as Donor's Adjusted Basis

When property is transferred by inter vivos gift, either outright or in trust, the donee's basis is the same as the donor's adjusted basis at the time of the gift. However, if the donor's basis is greater than the fair market value of the property at the time of the gift, the donee's basis is limited to the property's fair market value at the time of the gift for purposes of determining loss on a subsequent disposition of the property. IRC §1015(a).

The donee's basis is increased by the amount of gift tax paid, limited to the amount of the gift tax attributable to the net appreciation in the value of the gift. IRC §1015(d)(6)(A). Net appreciation is the amount by which the fair market value of the gift exceeds the donor's adjusted basis. IRC §1015(d)(6)(B).

The California rules for the basis of property transferred during lifetime are the same as federal law. California has incorporated by reference IRC §1015. Rev & T C §18031.

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§3.107 2. Planning Considerations

In general, the basis rules support lifetime gifts of appreciated rather than depreciated property. Particularly if the donee's income tax bracket is lower than the donor's, it may be advantageous to transfer property to the donee that has a significant amount of built-in gain. In addition to the benefit of the lower brackets, the donee will receive an increase in basis for the gift tax, if any, paid on the transfer. That increase will further lessen the gain recognized on a subsequent sale of the property.

If the donor is elderly or in poor health, however, a gift of appreciated property may not be an appropriate plan. It may be more beneficial for the donor to retain the property so that it receives a stepped-up basis when it is transferred at death.

It is ordinarily not good strategy to transfer property that has so depreciated in value that the donor's basis exceeds the fair market value. If such property is transferred, the donee's basis for determination of loss on sale will be limited to fair market value at the time of the gift. Because there is no net appreciation, no adjustment can be made for gift tax paid. IRC §1015(d)(6). Therefore, the full benefit of the depreciation is lost. The better plan is for the donor to sell the property, realize the loss, and transfer the proceeds or some other property as a gift.

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§3.108 D. Basis Rules After Scheduled Repeal of Estate Tax

Under the Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA-2001) (Pub L 107-16, 115 Stat 38), the step-up in basis is eliminated for decedents dying after December 31, 2009. IRC §1022(a). This change coincides with repeal of the estate tax, which is scheduled to become effective for decedents dying in 2010. Because the gift tax remains in effect, EGTRRA-2001 makes no modifications to the IRC §1015 basis rules for lifetime transfers. EGTRRA-2001 provides that property transferred at death will have a carryover basis determined in the same manner as the basis for property transferred during lifetime under IRC §1015. Therefore, property acquired from a decedent will usually have a basis equal to the lesser of the decedent's adjusted basis or the fair market value of the property on the date of death.

A special allowance of up to $1.3 million can be used to increase the aggregate basis of a decedent's eligible noncash appreciated assets. This special allowance is increased by the amount of the decedent's unused capital loss and net operating loss carryovers and the sum of any losses that would have been allowed under IRC §165 (generally losses from the sale of exchange of property held for business or investment purposes) had the property been sold at fair market value immediately before the decedent's death. IRC §1022(b). The special allowance is to be allocated among the decedent's assets by the personal representative. IRC §1022(d)(3). In the case of a nonresident noncitizen decedent, the special allowance is $60,000. IRC §1022(b)(3). An additional $3 million allowance is allowed for qualified spousal property. IRC §1022(c)(1)-(2). Qualified spousal property is either property that is transferred outright to the surviving spouse, or qualified terminable interest property. IRC §1022(c)(3). Property ineligible for basis increase is enumerated in IRC §1022(d).

NOTE: The basis adjustment rules discussed in the section will not apply if the federal estate tax is extended into 2010 and beyond by legislation, or after 2010 if the federal estate tax is reinstated under the sunset provision of EGTRRA-2001 (Pub L 107-16, §901, 115 Stat 38). For further discussion of the carryover basis rules, see Drafting California Revocable Trusts, chap 4 (4th ed Cal CEB 2003). Implementation of the carryover basis system requires additional recordkeeping by clients and will inevitably generate some uncertainty about the basis of assets. Although the change will not take effect until 2010, it would be prudent for clients to begin assembling basis information about the assets that they currently own, and they should maintain good records of assets that they acquire in the future.

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§3.109 X. IRC TAX RETURN PREPARER PENALTIES

The Internal Revenue Code (IRC) imposes a variety of civil and criminal penalties for failure to comply with the requirements applicable to tax return preparers. A "tax return preparer" is any person who prepares for compensation, or who employs one or more persons to prepare for compensation, any tax return imposed by the IRC or any claim for refund of tax imposed by the IRC. The preparation of a substantial portion of a return or claim for refund is treated as if it were the preparation of that return or claim for refund. IRC §7701(a)(36).

Perhaps the most significant of the preparer penalties, from the point of view of an estate planner who prepares gift and estate tax returns, is the penalty for preparing a return or refund claim with respect to which there is an understatement of tax liability due to an unreasonable position about which the preparer knew or should have known. IRC §6694(a)(1). An unreasonable position is one (IRC §6694(a)(2)):

- Not based on substantial authority and not disclosed;
- That is disclosed but for which there is no reasonable basis; or,
- In the case of a position relating to a tax shelter or a position to which IRC §6662A applies, is more likely than not to be sustained on its merits.

The tax return preparer penalty regulations under IRC §6694(a)(2) are further elucidated in the regulations, which provide that a practitioner may not sign a return as a preparer (which may include preparation of a document used in connection with the preparation of a return under IRC §7701(a)(36) and Treas Reg §301.7701-15(b)) unless there is *substantial authority* for each position taken on the return or there is a *reasonable basis* for each position and each position is adequately disclosed to the IRS. Treas Reg §1.6694-2(d). See Notice 2009-5, 2009-3 Int Rev Bull 309, discussed in 30 CEB Est Plan Rep 91 (Feb. 2009). See also *Tax Return Preparer Penalties: New Proposed Regulations and a Possible Statutory Change*, 30 CEB Est Plan Rep 5 (Aug. 2008).

Substantial authority is the level of support needed for a position taken by the taxpayer to avoid certain penalties; it is lower than the confidence level required by the "at least more likely than not" standard applied to covered reliance opinions under Circular 230, discussed in §2.60.

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4

Difficult Family Situations

Monica Dell'Osso

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§4.1 I. INTRODUCTION

Assessment of a client's estate planning needs requires a careful analysis of that individual's family situation and relationships. A client's marital status or status as a registered domestic partner, whether or not he or she has children, and the particular problems of children or other family members are some of the issues that may influence a decision about the structure of the estate plan. These same factors may also affect the attorney's evaluation of whether the client's estate is simple and uncomplicated or presents sufficient complexities to warrant referral of the case to other counsel.

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II. UNMARRIED CLIENT

§4.2 A. Family Status

If the client is unmarried, the threshold inquiry should be whether he or she has never been married, is widowed, or is divorced. The next question is whether the client has children and, if so, whether they are adults or minors and whether any of them have special needs or problems.

If the client is divorced, it is important to ascertain whether there is a property settlement agreement, support decree, or other dissolution order that may affect the estate plan. For example, if the client has an obligation for payment of child support, that obligation continues after the client's death and is enforceable against the decedent's estate (see *Taylor v George* (1949) 34 C2d 552, 212 P2d 505) or revocable trust (see *Marriage of Perry* (1997) 58 CA4th 1104, 68 CR2d 445). The agreement or court order may require the client to maintain an insurance policy naming a former spouse or children as beneficiaries. This requirement eliminates any planning options with respect to the policy.

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§4.3 B. Identification of Beneficiaries

The unmarried client who has easily identifiable beneficiaries such as children, other close family members, or friends usually presents a straightforward planning situation. In fact, if the assets held in the client's name alone have a value of less than $100,000 and are not expected to increase above that level, a simple will may be sufficient. For estates that are under $100,000, summary procedures are available for transfer of the assets and no probate is required. Prob C §§13100-13116, 13150-13158, 13200-13210. A will, coupled with a durable power of attorney for asset management and an advance health care directive to address the incapacity issues, may satisfactorily meet the client's needs. Even a statutory will under Prob C §§6200-6243 may be appropriate in this case.

A more difficult situation occurs with an unmarried client who does not have clear beneficiary choices. This may be an older client who has no children but maintains relationships with various relatives, none of whom the client wants to offend. It may be a client who has no close family or friends whom he or she wants to include in the estate plan. It may even be a client who has children or close relatives, but wants to treat them differently as beneficiaries. Each of these clients will need careful guidance in developing a plan that reflects his or her intentions and desires, but minimizes the possibility of a post-death challenge. Despite the fact that the client may want to omit any provision for a particular relative or other individual, it may be prudent to consider including some gift to that person as a disincentive to contesting the estate plan. See Prob C §21300(d), repealed operative January 1, 2010; Prob C §§21310-21315, operative January 1, 2010. The attorney should carefully document his or her file regarding the decision that the client does make.

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§4.4 C. Selection of Fiduciaries

For the unmarried client who has no children or close relatives, selection of an executor, a trustee, and agents under a durable power of attorney for asset management and an advance health care directive may prove as difficult as identifying beneficiaries. In a modest estate, a corporate fiduciary is usually not an option. Most banks and trust companies have financial minimums that would preclude them from acting.

The choices are then a professional adviser such as an accountant or attorney or a private professional fiduciary. It is usually inappropriate for the attorney to serve as a fiduciary because a conflict of interest with the client may arise. The better choice may be a private professional fiduciary who is completely independent. Because the client is not likely to know or have information about such individuals, the attorney should assist the client in identifying them. One source is the Professional Fiduciary Association of California (PFAC), which is an active statewide organization of private professional fiduciaries. A list of its members may be obtained by contacting the organization at One Capitol Mall, Suite 320, Sacramento, CA 95814; telephone: (916) 669-5330 or (866) 886-7322 (toll free); http://www.pfac-pro.org. The attorney should encourage the client to meet personally with several potential fiduciaries before making a selection.

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III. MARRIED CLIENT

§4.5 A. No Prior Marriages

Married clients who have had no prior marriages and have no children from another relationship present a comparatively uncomplicated planning situation. Particularly if the marriage is a long one, the couple's assets probably have been acquired entirely during the marriage and are community property. Fam C §760. There is typically little, if any, separate property. If the marriage is of shorter duration, one spouse may have retained as separate property assets that he or she owned before the marriage. However, these are often modest in value relative to the overall size of the estate. As a result, there are no significant issues related to characterization and ownership of assets. Although a property agreement should be prepared as part of the estate plan, it will simply confirm the community property character of the assets. See §4.8 for discussion of property agreements.

Assuming a harmonious family, the plan for these clients will include an outright gift to the surviving spouse, with the children, in equal shares, as the alternate beneficiaries. Depending on the ages of the children, a trust or custodianship may be necessary for management of the assets. See §§4.26-4.27.

The choice of fiduciaries, *i.e.*, an executor, trustee, and agent under a durable power of attorney for asset management and advance health care directive, is similarly straightforward. The surviving spouse is routinely nominated in these roles and an adult child, a collateral family member, or some other individuals are nominated as alternates. Corporate fiduciaries usually are not favored and are typically unwilling to serve in small estates. Also, corporate fiduciaries are usually unwilling to serve as agents under durable powers of attorney or advance health care directives.

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§4.6 B. Blended Family

Clients who have prior marriages and children by those other relationships, and perhaps by the current spouse as well, present a more challenging situation. Though the clients' assets may be modest, planning for them in the context of the "blended family" requires careful analysis.

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§4.7 1. Conflicts of Interest

A basic principle of the attorney-client relationship is the attorney's duty to avoid representing conflicting interests. Cal Rules of Prof Cond 3-310. In the estate planning arena, it is common for the attorney to represent both spouses. Joint representation in that circumstance rests on the assumption that no actual conflict of interest exists between the spouses and that there is no confidentiality as to communications between the attorney and either or both clients. If the clients execute an informed written waiver as required by Rule 3-310(C), the attorney may proceed with the joint representation.

Although the spouses' estate planning goals may differ somewhat, the attorney is not automatically prohibited from handling the representation. The attorney may still be able to function as the adviser for both parties. However, that position requires particular scrutiny in the case of a blended family. The complexity of the various relationships may result in potential conflicts that make joint representation inappropriate. For example, if each spouse has children by a prior marriage whom he or she intends to be the primary beneficiary of his or her estate, it may be difficult for one attorney to advise both parties. The divergence in objectives may be too pronounced for joint representation to be feasible or even sensible. The only option may be for each spouse to have separate counsel who will assist the clients in structuring a joint estate plan or, in the alternative, to have separate plans.

For further discussion of conflict situations, see chap 2.

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§4.8 2. Characterization of Property

If either of the clients has previously been married, it is likely that their assets will include both community and separate property. They may well have acquired assets during the present marriage, which will be treated as community property. Fam C §760. However, one or both of them may also have received assets as the result of the termination of a prior marriage, whether by death or dissolution. These will be characterized as separate property. Fam C §770.

The clients may have executed a premarital agreement before their current marriage that defined their separate and community property interests. Despite the agreement, it is quite possible that the nature of the assets has become confused over time due to mistitling or commingling. There may have been a specific intention during the course of the marriage to transmute or convert the character of the assets from separate to community or from community to separate. See Fam C §850.

It is important at the outset to ascertain the precise character of the clients' assets. That information will determine the amount that each spouse is able to dispose of at death, a particularly important factor in the blended family. Unfortunately, that information may not be easy to obtain. Clients are often uncertain about when and how they acquired assets. The attorney must be prepared to spend time with the clients discussing these issues. The attorney should insist that the clients provide account statements, deeds, and the other documents necessary to verify the form in which title is held.

The estate plan should include an agreement that delineates the community and separate property assets. The agreement can also be used to transmute the character of property from community to separate or vice versa. Fam C §850. However, unless the agreement is merely a confirmation of the existing property ownership and characterization, the attorney must consider the need to refer one or both spouses to separate counsel. If the agreement includes transmutation provisions, such a referral is essential. See California Marital Settlement and Other Family Law Agreements, chap 18 (3d ed Cal CEB 2005). The clients, who are understandably concerned about the added cost, may resist the idea of separate counsel, but that consideration is far outweighed by the possibility that, otherwise, the agreement may be subject to successful attack in a subsequent dissolution action. See *Marriage of Delaney* (2003) 111 CA4th 991, 4 CR3d 378. Also, if one spouse dies, the fact that the parties did not have separate counsel makes the agreement potentially vulnerable to attack by the surviving spouse or the children of the deceased spouse.

Clients should be aware that transmuting property for estate planning purposes may have important consequences in a later dissolution, legal separation, or termination of registered domestic partnership. An express agreement to transmute separate property to community property effects a present transmutation. Language in the agreement that purports to limit the purpose of the transmutation to estate planning only will not be enforceable in a subsequent dissolution, legal separation, or termination of registered domestic partnership. *Marriage of Lund* (2009) 174 CA4th 40, 94 CR3d 84; *Marriage of Holtemann* (2008) 166 CA4th 1166, 83 CR3d 385.

Preparation of the agreement requires familiarity with and an understanding of family law principles. Practitioners who lack that expertise should decline the engagement completely or refer the clients to other counsel to assist with that particular task. Cal Rules of Prof Cond 3-110. See chap 2.

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3. Identification of Beneficiaries

§4.9 a. Description of Problem

While the problem for the unmarried client without close relatives may be the identification of beneficiaries for his or her estate plan, the difficulty for the clients in a blended family may be the determination of which of the various family members will be included in the plan. Presumably the surviving spouse of the current marriage and the children of that relationship will be beneficiaries. However, a spouse who has children by a prior marriage may want them to receive at least some interest in his or her estate. If the stepparent has adopted those children or has otherwise developed a close relationship with them, the stepparent will support that plan and may even wish to name the stepchildren as beneficiaries of his or her own estate. However, if the stepparent-stepchild dynamic is acrimonious or unpleasant, the stepparent may strenuously oppose even the other spouse's desire to include the children in his or her own plan.

As a threshold issue, the attorney must insist that the clients define their priorities with respect to the beneficiaries. In a modest estate, the economic realities may dictate that on the death of the first spouse the primary beneficiaries will be the surviving spouse and the children of that relationship, especially if the children are still young. The decedent's children by a prior marriage will ordinarily be of secondary importance.

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b. Bypass Trust

§4.10 (1) General Considerations

If the spouses are intent on ensuring that some portion of their respective estates passes to children by a prior marriage, a solution may be to create a trust on the first spouse's death. This trust, which is irrevocable, would be funded with the deceased spouse's separate property and his or her one-half of the community property. The surviving spouse would be the lifetime beneficiary of the trust and the decedent's children would be designated as the remainder beneficiaries. On the surviving spouse's death, the assets in the trust pass to the children.

In larger estates, such a trust, commonly referred to as a bypass trust, is used not only as a method of transferring assets to the first spouse's beneficiaries, but also as a means of reducing the federal estate tax liability. It is funded with that portion of the decedent's estate equal to the applicable exclusion amount, *i.e.,* the amount that an individual can transfer tax-free at death. IRC §2010. The bypass trust is not included in the surviving spouse's estate and is transferred tax-free to the remainder beneficiaries on the surviving spouse's death. See chap 7 for further discussion of bypass trusts.

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§4.11 (2) Disadvantages

Unfortunately, the bypass trust is not the perfect solution. One obvious difficulty is that the assets in the trust may be completely depleted during the surviving spouse's lifetime, leaving nothing for the stepchildren. A direction in the trust that the surviving spouse must exhaust his or her assets before drawing on the principal of the bypass trust will provide some limited protection. However, in a modest estate the surviving spouse, particularly one with a long life expectancy and minor children to support, may need the assets of the bypass trust. In that circumstance, creation of the bypass trust has done little more than provide the stepchildren with unrealistic expectations about their future inheritance.

The bypass trust may only heighten existing tensions between the surviving spouse and the stepchildren. At the time of the first spouse's death, the stepchildren must be notified of the creation of the trust and their interest in it. Prob C §16061.7. As remainder beneficiaries, they are entitled to make reasonable inquiries about the financial status of the trust. Prob C §16061. Particularly if the surviving spouse is the trustee, with the authority to make investment and distribution decisions, conflicts with the remainder beneficiaries may be inevitable. As discussed in §4.13, that may be a reason to consider designation of an independent trustee or cotrustee with the surviving spouse.

A practical difficulty with the bypass trust is that it adds administrative costs and complexity. Adherence to the record-keeping, tax-filing, and other requirements associated with management of the trust will only diminish the already limited asset base.

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Source: Estate Planning/Complete Plans for Small and Mid-Size Estates/4 Difficult Family Situations/ 4. Selection of Fiduciaries/§4.12 a. Overview

4. Selection of Fiduciaries

§4.12 a. Overview

In the blended family situation, selection of fiduciaries to act as executor, trustee, and agents under durable powers of attorney for asset management and advance health care directives can be a complicated, somewhat delicate task. Although the surviving spouse would seem the most logical choice, that designation may not always be appropriate.

If the estate is of modest size, a corporate fiduciary will usually not be an option. The estate will not meet the financial thresholds set by these institutions. Furthermore, most banks and trust companies will not take appointment as agents under durable powers of attorney for asset management, or accept any role in personal decision-making such as health care.

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§4.13 b. Trustee

If the plan includes a bypass trust with the surviving spouse as the lifetime beneficiary and his or her stepchildren as remainder beneficiaries, designation of the surviving spouse as sole trustee may be problematic, particularly if the relationship among the beneficiaries is less than harmonious. One possibility is to balance the interests by designating the surviving spouse as a cotrustee with one of the adult stepchildren. Unfortunately, that arrangement is not likely to improve the dynamic between the two groups. Another choice is to designate a third party as sole trustee or a cotrustee with the surviving spouse. Inclusion of an independent trustee will protect the surviving spouse from claims by the stepchildren that he or she is mismanaging the trust. The problem is that this arrangement may not be palatable to the surviving spouse, who may be opposed to any limitation of his or her authority.

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§4.14 c. Agent Under Durable Power of Attorney for Asset Management

The same considerations that apply to the selection of a trustee may operate regarding selection of alternate agents under a durable power of attorney for asset management. Spouses usually name each other to act as their primary agents. Particularly if the clients are using a revocable trust as a primary planning document, the agent under the durable power of attorney will have only limited authority. Because most of the financial matters will be handled in the trust, there will be comparatively few issues for the agent to address. Though the agent's authority would extend to management of life insurance, annuities, and retirement plans that are ordinarily not transferred to the trust, that authority could be limited so that the surviving spouse does not have the ability to change beneficiary designations or otherwise disrupt the decedent's plan.

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§4.15 d. Agent Under Advance Health Care Directive

If the spouses have adult children by prior marriages, the selection of an agent to make health care decisions may require careful consideration. One spouse may feel that he or she wants the children involved with the stepparent in making decisions about medical treatment. The feasibility of that arrangement will depend on the particular situation. A compromise solution may be to designate the surviving spouse as agent with sole authority to make decisions, but direct that the spouse consult with the stepchildren.

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IV. DOMESTIC PARTNERS AND SAME-SEX MARRIED COUPLES

§4.16 A. Creation of Domestic Partnership

In 2003 the California legislature passed the Domestic Partner Rights and Responsibilities Act of 2003 (DPRRA) (Fam C §§297-299.6). This law, which became fully operative on January 1, 2005, extended all the rights, obligations, and benefits of marriage to couples who met the statutory requirements for registration as domestic partners. Fam C §297.5. Subsequent legislation clarified that the rights provided under DPRRA were retroactive to the original date of registration with the state, even if that preceded January 1, 2005. Family Code §297 sets forth the following qualifications for registration as domestic partners:

- The registered partners must share a common residence.
- Neither partner may be married to someone else or be a member of another domestic partnership.
- The partners must not have a blood relationship that would preclude them from marrying each other.
- The partners must be at least 18 years of age.
- The partners must be of the same sex or, if different sexes, one or both must be eligible for Social Security and be over age 62.
- Both partners must be capable of consenting to the domestic partnership.

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§4.16A B. Status of Same-Sex Marriage

In 2008 the California Supreme Court determined that Fam C §§300 and 308.5, which limited marriage to opposite-sex couples, violated the due process and, applying the strict scrutiny standard of review, the equal protection guaranties of the California Constitution. *In re Marriage Cases* (2008) 43 C4th 757, 76 CR3d 683. The decision pertained to six consolidated cases that had raised a constitutional challenge to the statutes following San Francisco's issuance of marriage licenses to same-sex couples in 2004.

In November 2008, California voters approved an initiative measure, Proposition 8, which amended the California Constitution by adding Cal Const art I, §7.5, to limit marriage to opposite-sex couples. The validity of Proposition 8 was ultimately upheld by the California Supreme Court. *Strauss v Horton* (2009) 46 C4th 364, 93 CR3d 591. The court also determined that same-sex marriages that took place between June 16, 2008, the date of the court's decision in *In re Marriage Cases, supra,* and November 4, 2008, the date of the passage of Proposition 8, were valid.

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C. Estate Planning Issues

§4.17 1. General Considerations

Estate planning for same-sex couples (whether registered domestic partners, married same-sex couples, or registered domestic partners who also marry) involves many of the same issues that are relevant to planning for opposite-sex married couples. However, the potential conflicts of interest, the uncertainties related to the income, estate, and gift tax consequences of the planning and ambiguities with respect to the application of DPRRA make this engagement inherently more difficult. That is particularly the case if a couple formerly registered as domestic partners subsequently marries. Competent representation of couples in this situation may require significant expertise in family law. For that reason, it may be prudent for the attorney to refer same-sex couples to counsel who have experience in this area.

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§4.18 2. Conflicts of Interest

Provided the clients execute the informed written consent required by Cal Rules of Prof Cond 3-310(C), it is possible for the attorney to undertake joint representation of same-sex couples. The analysis of potential conflicts should not be significantly different from that which would be made in a planning engagement for opposite-sex couples. However, even in a modest estate, it may be sensible for the parties to obtain separate counsel. There may be property characterization and transmutation issues that necessitate separate counsel for each party. If the parties wish to enter into an agreement that delineates their respective rights and is intended to effect a transmutation, the parties definitely should have separate counsel.

With same-sex couples, there is often the possibility that the estate plan will be challenged by family members or others. If there is a particular concern that someone will contest the plan, it is usually advisable for the parties to have separate counsel. That perspective should govern even if the same-sex couple is preparing a joint estate plan.

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§4.19 3. Tax Issues

Unlike opposite-sex married couples, same-sex couples do not have the benefit of the unlimited marital deduction for transfers made during lifetime or at death. To be exempt from tax, the lifetime gifts must fall within the annual exclusion under IRC §2503, and transfers at death must be covered by the applicable exclusion amount under IRC §2010. Transfers of assets between domestic partners or married same-sex spouses that do not fall within the scope of these exclusions will be subject to gift and estate tax.

The IRS has issued an advisory memorandum stating that domestic partners will not be able to report income in the same manner as same-sex spouses. IRS Legal Memorandum 200608038. Though not a definitive statement on the issue, the presumption is that a similar perspective will apply to married same-sex couples with the result that the earning partner will be required to report his or her income on a separate return. The couple will not be permitted to submit joint returns or to file as married persons filing separately.

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V. UNMARRIED COUPLE

§4.20 A. General Considerations

Estate planning for couples who are living in a nonmarital relationship (whether opposite-sex or same-sex) and are not registered domestic partners, presents a number of issues. As in any other joint representation, there are conflict-of-interest considerations. These couples, unlike registered domestic partners, have none of the rights or obligations of married persons under the Family Code. Nevertheless they have issues related to property ownership that will usually require preparation of some type of formal agreement. The fact that they have been living together may give rise to certain claims or entitlements if the relationship is terminated. These issues should also be addressed in the agreement.

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§4.21 B. Conflicts of Interest

While joint representation of married couples is common practice, it is probably not as routine in the context of planning for unmarried couples. A primary reason for the difference is that unmarried couples require separate estate plans. As a result, joint representation does not provide the same efficiency and coordination for the unmarried couple that it does for the married couple.

Furthermore, although the couple's separate plans may be uncomplicated, there is always the possibility of a challenge, particularly if the plans exclude provisions for blood relatives. In the initial meeting with the couple, the attorney should attempt to assess these risk factors. If a contest seems likely, the couple should be advised to have separate counsel. The delicate task for the attorney will be to make that determination without becoming involved in a conflict situation that would require complete withdrawal from the case. If the attorney obtains confidential information in the course of the preliminary meeting, he or she may be precluded from representing either of the parties. Therefore, any introductory sessions with the couple will have to be handled carefully.

Assuming the attorney determines that joint representation is appropriate, the engagement cannot proceed unless the parties execute a written consent to the representation and a waiver of confidentiality as to any communications between either of them and the attorney. Cal Rules of Prof Cond 3-310(C). To the extent that there are particular issues, such as ownership of assets, that would raise potential conflicts, these should be specifically addressed in the consent. Failure to do so may undermine the validity and effectiveness of the document.

See chap 2 for further discussion of conflicts of interest.

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§4.22 C. Property Ownership

The manner in which the couple holds title to their assets will be an important factor in the planning. The simplest situation is one in which both parties have maintained assets in their separate names. If that is the case and the non-owning party makes no claim to an interest in the other's assets, drafting the estate planning documents should be relatively uncomplicated.

If the couple has acquired assets in their joint names, the planning becomes more complex. They may hold assets as joint tenants with right of survivorship or as tenants in common. In a joint tenancy, the ownership interests are equal. CC §683. A tenancy in common may have unequal interests. CC §685.

Even in modest estates, joint tenancies are not an effective way to provide for transfer of property on death. Joint tenancies provide only one-dimensional planning, namely transfer of the asset to the surviving joint tenant. There is no opportunity to incorporate an alternate plan if both joint tenants are deceased. The better strategy is to sever the joint tenancy so that each party owns a tenancy-in-common interest that can be separately devised. Each party can then provide in his or her will or trust for transfer of the asset to the other on death, with an alternate plan to take effect if the primary beneficiary has died. See chap 7 for further discussion of joint tenancy.

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§4.23 D. Cohabitation Agreement

It will be advisable in almost all cases for the unmarried couple to enter into a formal agreement that addresses issues such as their respective interests in and ownership of assets; support and maintenance; and dissolution of the relationship. Preparation of the agreement may well constitute the most difficult part of the engagement.

Cohabitation agreements are governed by contract law under the Civil Code. The Family Code does not apply, except with respect to parentage and child support, which are usually not modifiable by contract. Such agreements are enforceable, except to the extent that they are explicitly founded on meretricious sexual services. *Marvin v Marvin* (1976) 18 C3d 660, 134 CR 815. Indeed, one of the important reasons for couples to execute a formal agreement that articulates their respective rights is to avoid a claim by one party at the time the relationship ends that there was an express or implied contract under the authority of the *Marvin* case.

The cohabitation agreement should be handled in the same manner and with the same formalities as a premarital agreement. Therefore each party should be advised to retain separate counsel.

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VI. CHILDREN

§4.24 A. Overview

Even in a simple estate, providing for children can often make the plan considerably more complex. There are often circumstances that require special attention, *e.g.,* an adult child who is estranged from the family, minor children, and those with substance abuse problems or some other type of disability.

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§4.25 B. Adult Children

In the harmonious family, provisions for adult children usually create few, if any, difficulties. Children are treated equally as beneficiaries and the chances of a challenge are virtually nonexistent. As discussed in §§4.11 and 4.13, the stepparent-stepchild relationship can be problematic, but the structure of the plan and the selection of the fiduciary may ameliorate some of these issues.

A complication may develop if one of the adult children has become disaffected from an otherwise close family. The parents' dilemma will be to determine whether the child should be treated differently from the other children or omitted completely. A decision to eliminate any provision for the child should be carefully considered. A more prudent approach may be to include at least some provision for the child in order to discourage him or her from challenging the estate plan. See Prob C §21300(d), repealed operative January 1, 2010; Prob C §§21310-21315, operative January 1, 2010. If the clients cannot be convinced to take that step, then the attorney should carefully document the file regarding the decision.

At the other end of the spectrum is the child who is very close to the parents, perhaps even lives with them. That child may be more involved with and helpful to the parents than their other children. In the estate plan the parents may wish to provide more for that child as compensation for his or her assistance. While favoring such a child may be understandable, it may produce a level of discontent among the other siblings. The clients should be encouraged to consider a discussion with all of their children to explain their feelings and the basis for their decision. If the clients are unwilling to divulge their intentions, then the attorney should proceed to document his or her file regarding the decision that is made.

Of course, the issues shift markedly if the child who is living with the parents is a problem in their lives. If so, the attorney will have to examine carefully any directions to treat that child more favorably. In particular, the attorney should be attuned to any evidence of undue influence or abuse.

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C. Minor Children

§4.26 1. Custodianship

In a small estate, a gift under the California Uniform Transfers to Minors Act (CUTMA) (Prob C §§3900-3925) offers an alternative to the complications of a guardianship or trust for management of property for a minor child. However, if the minor dies before attaining the specified age, the assets must be paid to his or her estate. If the minor dies without a will, the assets will revert to the parents. These considerations, and the additional constraint that custodianships terminate when the beneficiary is relatively young, make CUTMA gifts appropriate only for transfers of modest amounts of property. If there are several children, the fact that there can be only one beneficiary for each CUTMA gift further limits their usefulness.

For further discussion of CUTMA, see chap 7.

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§4.27 2. Trust

If the gifts to the children are more significant, *i.e.,* the children receive the entire estate on the parents' death, a trust is the preferred vehicle for management of the assets. A trust affords a greater degree of planning flexibility than a custodianship or guardianship. The timing and manner of distributions and the schedule for termination are among the trust provisions that can be specially tailored to meet the clients' particular situation.

The family pot trust is generally appropriate for a modest estate and relatively young children. If the estate is small in size, the complexities and administrative costs of multiple trusts are an important consideration. Also, the separate trusts may not be large enough to provide for the needs of the individual children, particularly if they are young and will require support for a number of years. If one child has unusual expenses, his or her trust may be seriously depleted. A pot trust allows the assets to be managed for the needs of all the children and ensures that there are adequate funds for support of the younger children who will require support for a longer period of time.

In some cases there may be a concern that postponing distribution of the pot trust until the youngest child reaches a certain age may be unfair to the older children whose distribution is delayed. A solution is to allow the trustee discretion to make preliminary distributions of principal to children once they reach a particular age. These distributions are charged against the child's ultimate share of the trust and can be limited to a certain percentage of that share.

For further discussion of family pot and separate-share trusts for children, see chap 7.

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§4.28 3. Guardianship

Unless provisions have been made for a custodianship or a trust, the client must designate a guardian to handle the financial affairs of the minor children. The guardian's responsibilities are divided into those pertaining to a minor's person and those related to a minor's estate. The guardian of the person has the same authority with respect to the minor children as a parent having legal custody and may exercise such authority without court authorization, instructions, or approval. Prob C §2108(a). The guardian of the person has the care, custody, and control of the child and has charge of the child's education. Prob C §2351(a). Although it is not a legal responsibility, the guardian also assumes the role of the parent in providing love, attention, and nurturing to the child.

The guardian of the estate has responsibility for management and control of the property of the minor children. Prob C §2401. The guardianship proceeding is subject to the ongoing supervision of the court, which imposes various requirements, including the filing of a bond and periodic accountings.

For more detailed description of guardianship of the person and of the estate, see chap 7.

A guardianship of the estate is rarely the planning tool of choice. It is inflexible and cumbersome. The requirement of court supervision adds both cost and complication to the management tasks. A guardianship of the estate terminates and the assets are distributed to the minor when he or she reaches age 18, even though the minor may be ill-equipped to handle the property at that point. To avoid these problems, the clients should be counseled to consider a custodianship or trust as an alternative to a guardianship for management of a child's financial affairs.

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4. Selection of Fiduciaries

§4.29 a. Overview

Selection of a guardian, trustee, and custodian to assume responsibility for the personal and/or financial affairs of minor children is one of the more important decisions that a parent can make. It can also be one of the most difficult. It is incumbent on the attorney to make sure that this decision receives adequate attention and consideration. A crucial part of the process is the coordination of the various nominations so that the fiduciaries who are selected will be able to function as an effective team in managing the children's affairs.

In a modest estate, the clients will probably be required to look to individuals to fill these roles because the financial minimums set by most corporate fiduciaries will eliminate them from consideration. Also, banks and trust companies will not accept appointment as guardian of the person.

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§4.30 b. Nomination of Guardian

Although a carefully planned estate will most often provide a trust for management of the financial affairs of the children, the clients should nominate guardians of both the person and estate. It is preferable for the parents to select the fiduciary rather than leave this choice to the court if appointment of a guardian of the estate is needed at some later point. Also, failure to nominate a guardian may lead to intrafamily disputes.

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§4.31 (1) Guardian of Person

In selecting a guardian of the person, the parents should focus on an individual who is interested in and has a concern for the children. Ideally, the nominee should be someone whom the children know and with whom the children have regular contact. Loss of a parent will be traumatic for the child. If the person who steps into the role of the parent is someone who is already part of the child's life, it may lessen the disruption. Frequently the choice falls on relatives, because they are perceived as a natural thread of continuity in the children's life.

The age and residence of the prospective nominee are other factors to consider. The nominee should be someone whose age and health are commensurate with the responsibility of raising the children, which often rules out grandparents or older relatives and friends. If the parents wish the children to be raised in the same community, the residence of the prospective guardian will be important.

A common arrangement is appointment of a couple to act as guardians of the person. There is a sense that this arrangement will most satisfactorily duplicate the family structure that the child has lost. If a couple is selected, the parent must decide whether he or she is satisfied to have one spouse act alone as a guardian in the event the marriage is terminated by death or dissolution.

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§4.32 (2) Guardian of Estate

Nomination of the same person to act as both guardian of the estate and trustee of any trusts created for the children is usually appropriate. It provides for efficient and coordinated management of the children's financial affairs.

The clients should evaluate the business background and experience of the nominees. Someone who has little knowledge about or familiarity with finances and investment would usually be a poor choice. The individual need not be extremely sophisticated in this area, but should at least be astute enough to seek advice from accountants, investment advisers, and other professionals. Although a prior relationship with the child is less important in this context, it is nevertheless desirable for the guardian to have some familiarity with the children and the family. This background will assist the guardian in working with the guardian of the person and making appropriate financial management decisions.

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§4.33 c. Trustee and Custodian

The factors that apply to selection of an individual to act as guardian of the estate apply as well to designation of a trustee. Perhaps a greater degree of sophistication is appropriate for a trustee who has broader discretion with respect to management of assets than a guardian of the estate who is operating under court supervision. Another consideration is the fact that the trustee of a trust may be serving for a longer period of time than the guardian. A guardianship of the estate terminates when the minor reaches 18. A trust for the same child may extend some years beyond the age of legal majority.

Because a trust for young children is usually structured to continue for a significant period of time, it is important to provide for trustee succession. This requires naming several individuals to serve and providing one or more of them, or an independent person, with the authority to nominate a successor. That structure will minimize the possibility of a vacancy in the office of trustee and the need to rely on a petition to the court.

In a smaller estate, if all or most of the minor's financial assets will be held under the California Uniform Transfers to Minors Act, the factors that apply to selection of an individual to act as trustee apply as well to designation of a custodian. It is also important that the client name a successor or alternate custodian in case the originally named custodian is no longer able or willing to serve.

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D. Problem Children

§4.34 1. Nature of the Problem

With increasing frequency, clients are faced with the reality of children who have special problems or needs. These children may suffer from a drug or alcohol abuse problem or have a physical, mental, or psychological disability that prevents them from functioning properly and assuming full responsibility for their lives. Planning for these children, whether adults or minors, requires particular attention. However, the issues cannot be properly addressed unless the clients are candid with the attorney about the situation. Some clients are embarrassed or reticent to discuss a child's problems. Perhaps the clients have yet to face the reality themselves and are therefore unable to communicate about it in an effective way. In these circumstances it will be the attorney's task to ferret out the relevant information. What will be important in these conversations is not only the objective data about the child's condition, but also the clients' personal reactions to and feelings about it. Careful consideration of this more subtle, subjective element will assist the attorney in drafting a plan that adequately meets the clients' objectives in planning for the child.

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§4.35 2. Solution

The usual solution to the problem child will be a trust for ongoing management of his or her share of the estate, although a trust is not a perfect answer. On a practical level, it adds administrative cost and complexity, which may be a distinct disadvantage when the property involved is modest in value.

The trust can continue until a specified age, when it is anticipated that the child will be better able to handle his or her affairs. Alternatively, distributions can be staggered over a period of years as the child matures. If the issue is substance abuse, the trust may include authority for the trustee to require a rehabilitation program and testing as conditions for distributions. If the child has physical or mental disabilities that are not expected to resolve, the trust will be structured to continue for the child's lifetime.

If the child is receiving public benefits through a program that requires the recipient to have assets below a certain level, or if the child is expected to be reliant on such programs at any time in the future, a special needs trust must be considered. This trust, which exists for the child's lifetime, is structured to supplement rather than supplant the support that is being provided by the government programs. The trustee has authority to distribute funds for the child's "special needs," which include dental care, recreation and entertainment, special equipment and programs of training, education, and treatment that are not provided by the public programs. If the trust is properly designed and administered, it will not be considered a resource for determining the child's eligibility for government programs. The public benefit programs and the rules regarding special needs trusts are complicated. Furthermore, the legislation and regulations in the area change frequently. Unless the attorney has some experience with special needs trusts and their operation, it may be advisable to refer the clients to practitioners who are more familiar with these entities.

See chap 6 for further discussion of special needs trusts.

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§4.36 3. Selection of Fiduciaries

Selection of a trustee to assume responsibility for the financial affairs of the problem child is both an important and difficult decision. If the trust is modest in value, it will not meet the financial minimums established by corporate fiduciaries, so the only option will be an individual trustee. Ideally, the fiduciary should be someone who is familiar with the child and his or her situation. An adult sibling would seem a logical choice. Unfortunately, naming a brother or sister as the trustee of an ongoing trust for a sibling may engender or increase mutual resentment and hostility between them. If the clients cannot identify another family member or a third person to serve as trustee, a private professional fiduciary is an option.

Because the trust is usually structured to continue for a significant period of time, perhaps for the child's lifetime, it is important to provide for trustee succession. Such planning necessitates naming several individuals to serve and providing one or more of them, or an independent person, with the authority to nominate a successor. That structure will minimize the possibility of a vacancy in the office of trustee and the need to rely on a petition to the court.

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5

Problem Assets

Richard A. Burger

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§5.1 I. INTRODUCTION

The existence of certain assets should alert the general practitioner that, notwithstanding the client's insistence, a "simple" estate plan may not be appropriate. In some cases, the attorney may be able to identify the issues and perform the additional research necessary to properly prepare the plan. See chap 2 on duty to act competently. In other cases, the attorney may decide that the additional time needed to acquire the necessary competence is an inefficient use of the attorney's time and/or the client's money. This chapter highlights some commonly encountered problematic assets so the attorney can decide whether to continue with the engagement, obtain assistance from someone who has the necessary expertise, or decline the engagement and refer the matter elsewhere.

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§5.2 II. OUT-OF-STATE REAL PROPERTY

It is not uncommon for California residents to own real property in another state. The client's ownership of out-of-state real property or tangible personal property of significant value will complicate the estate planning process.

NOTE: Some California residents may also own tangible personal property (such as boats, motor homes, collectibles, furniture, furnishings, and artwork) with an actual situs in another state. Although §§5.3-5.6 discuss out-of-state real property, most of the issues addressed also apply to tangible personal property in another state.

For further discussion of estate and inheritance tax planning for out-of-state real property, see Estate Planning for Special Assets, chap 5 (Cal CEB 2004).

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§5.3 A. Foreign State Estate and Inheritance Taxes

Although the elimination of the state death tax credit has effectively repealed the California estate tax, other states have taxing regimes that operate independently of a federal credit. Some states, for example, impose an independent state estate tax that has not been phased out by the elimination of the IRC §2011 credit. Other states impose inheritance taxes, which are imposed separately on each transferee at a rate dependent on the transferee's relationship to the decedent.

NOTE: Before the Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA-2001) (Pub L 107-16, 115 Stat 38), California's estate tax was a "pick-up tax," *i.e.,* a portion of the estate tax equal to the maximum state death tax credit was paid to the State of California and the rest was paid to the United States Treasury. IRC §§2001, 2011. Beginning for decedents dying in 2005, the state death tax credit was eliminated entirely; there is no longer any estate tax paid to the State of California.

If a client owns out-of-state real property (or it is likely that more than one state might claim that the client was domiciled in that state), the attorney must be alert to the possibility that the client's out-of-state property may be subject to that state's estate or inheritance tax, even if the estate has no federal estate tax liability (*e.g.*, if that state's applicable exclusion amount is lower than the federal exclusion amount). In addition, if the client has out-of-state property in more than one state, each of those other states may calculate the tax differently, further complicating the estate planner's task.

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§5.4 B. Estate Planning Options and Problems

Because of the repeal of the California estate tax, it may be desirable to have a California situs for assets. The estate planning options noted below all raise practical problems involved in transferring title to real property located in another jurisdiction. See discussion in §5.6. The estate planning options that an experienced estate planner might consider include the following:

- Selling the out-of-state property. When considering a sale, however, any estate tax advantages realized by a sale of the property may be offset by the capital gains on the sale of appreciated property.
- Making an inter vivos gift of the property, if the foreign state does not have an inheritance tax. However, a gift may use up the decedent's federal exclusion amount and would cause the donee to lose any step-up in basis that he or she would receive at the donor's death; if the donee sells the property, he or she might incur a significant capital gain tax. One must also consider the IRC §2035(b) 3-year rule, requiring inclusion in the donor's gross estate of any gift taxes paid during the 3 years before the donor's death.
- Conveying the property to a business entity, such as a limited liability company (LLC), in order to convert the property into intangible personal property that will be California property for estate tax purposes. The costs of establishing and operating the entity must be weighed against the potential estate tax liability.

For married couples, there are numerous estate planning techniques that might be considered, but most involve sophisticated multitrust planning that is well beyond the scope of a simple estate plan.

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§5.5 C. Importance of Tax Apportionment Clause

When a client's estate includes property in another state, it is generally advisable to include a provision in the will or trust concerning the source of funds that will be used to pay the various taxes and the persons responsible for paying them. The California apportionment statute applies only to federal and California estate taxes. Prob C §20100(a). Because there are no California estate taxes for decedents dying after January 1, 2005, the out-of-state statute may come into play, and property passing to a surviving spouse or other beneficiary may be looked to for payment of any tax. This is often contrary to the decedent's wishes, so the attorney should tailor tax clauses to take into account the state of domicile and whether the decedent owns out-of-state property.

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§5.6 D. Foreign State Rules Affect Real Property Transfers

In California, the preparation and recording of deeds are subject to numerous considerations, including whether to use a quitclaim or grant deed, proper formatting (required margins, the location of assessor's parcel numbers, documentary transfer tax statements, and property tax mailing instructions), documentary transfer taxes and exemptions, and property tax reassessment issues. Simply keeping current with the relevant rules as they are applied in each California county can be a challenge.

Properly drafting a deed for real property located outside of California requires consideration of additional issues, such as whether:

- There are different forms of conveyances or holding title (*e.g.,* warranty deeds, tenancies by the entireties);
- A trust holding real property must be recorded;
- Special tax or homestead exemptions will be lost by transferring property to a trust; and even whether
- A California lawyer, not admitted to practice in a sister state, who drafts a deed for property in the sister state, might be engaged in the unauthorized practice of law in the other state.

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§5.7 E. Conclusion

Because of the estate or inheritance tax concerns, preparing an estate plan for a client with out-of-state property always raises the issue of competence. See discussion in chap 2. The attorney generally should not prepare deeds for out-of-state real property because of the complexity and differences in other state rules for real property transfers and because of the possibility that the attorney will be engaging in the unauthorized practice of law in that state. The best solution would generally be to work with an attorney in the other state regarding the estate or inheritance tax issues and have that attorney prepare any transfer documents.

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III. VACATION HOMES

§5.8 A. Nontax Issues

Most clients have at least one asset that has emotional significance far beyond its monetary value; frequently, a vacation home is such an asset. The client often wants to keep the vacation home "in the family," and would like an estate plan that facilitates shared use among family members after the client's death.

Shared ownership of a vacation home can present more challenges than shared ownership of investment property. Family members may disagree on such things as how to allocate use of the property, whether and how frequently the property should be rented to third parties, succession issues, allocation of expenses, and maintenance issues. These issues may be handled informally among the family members, but it is better if the property is subject to a formal governance structure, such as a trust, written cotenancy agreement, or business entity (*e.g.,* a limited liability company, limited partnership, or general partnership). The descendants may receive the property outright and agree on a governance arrangement themselves, or the senior generation may create the structure before transferring the property to the descendants.

For complete discussion of estate planning for vacation homes, see Estate Planning for Special Assets, chap 4 (Cal CEB 2004).

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§5.9 B. Estate Planning Issues

If the client's estate is subject to estate tax (part of which will be attributable to the vacation property itself), it may be advantageous for the client to begin transferring ownership to the next generation to reduce the size of the estate. Although making gifts of substantial interests in the vacation home may use some or all of the client's applicable exclusion amount, such a transfer may be a good use of the exclusion, particularly if the value of the property appreciates in the future.

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§5.10 1. Direct Transfer to Family Members

A transfer to family members as tenants in common is the simplest way to transfer a vacation home. CC §§685-686. Of course, the burden is then on the family members to create a management structure for the property. At a minimum, a written cotenancy agreement covering the management, financial obligations, and succession interests should be executed. It is advisable that each cotenant waive the right to partition in the agreement. Otherwise, the property will be subject to an involuntary sale if any cotenant (or his or her creditor) exercises the right to partition under CCP §§872.210 and 872.710.

PRACTICE TIP: The agreement, with provisions binding the parties as to any interest they hold or acquire in the property, should be drafted and signed by all parties before the property is transferred. This will avoid such problems as finding, after the transfer, that one child will not agree to waive the right to partition or that an agreement is not drafted due to inertia. If the entire vacation property is transferred and the donor wishes to continue to use the property, the safest approach is to pay fair market rent to the transferees or to a trust for their benefit. In the more common situation involving only a partial transfer, the organizational or operating document should provide for usage on a basis proportional to the ownership interests. If a document is carefully drafted to limit the donor's possession or occupancy to a particular time segment or a certain part of the property, there may be a basis for limiting inclusion in the donor's estate to that portion. Rev Rul 79-109, 1979-1 Cum Bull 297.

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§5.11 2. Planning Using QPRT, Family Limited Partnership, or LLC

The transfer could be accomplished through more elaborate mechanisms, such as a qualified personal residence trust (QPRT). A QPRT is an irrevocable trust that is specifically sanctioned by statute. IRC §2702(a)(3)(A)(ii). The grantor of a QPRT transfers the residence to the trust, and retains the right to occupy the residence for a period of years. At the end of the term, ownership of the residence passes to the beneficiaries designated in the trust. The duration of the trust is selected by the grantor, but selecting the term is somewhat of a gamble. The longer the term, the lower the value of the taxable gift, because the beneficiaries must wait that much longer before they own the property. Yet if the grantor dies before the term has run, the full value of the residence is included in his or her estate as if no gift had been made.

A QPRT may not own any asset other than the personal residence of the settlor, except for reasonable amounts of cash for operating expenses. Treas Reg §25.2702-5(c)(5)(ii). The grantor can establish QPRTs for both a personal residence and a vacation home used at least 2 weeks a year (Treas Reg §25.2702-5(b)(2)(i)(A)-(B)) (two separate trusts must be created), but not for two vacation homes. See Treas Reg §25.2702-5(c)(2)(i). A second trust that governs the use of the property after the QPRT term expires can be the beneficiary of the QPRT as long as the grantor does not have any powers or interests with respect to the second trust that would cause the trust to be included in the estate of the grantor or the grantor's spouse. Such a trust could, for example, include terms that specify the rights and duties of the children.

PRACTICE TIP: The terms of the continued trust may be incorporated into the QPRT document, but many practitioners prefer to use a separate trust document. A separate trust document emphasizes the fact that the "continued" trust is actually a different trust in terms of disposition scheme and tax consequences.

Revenue Procedure 2003-42, 2003-1 Cum Bull 993, provides sample trust provisions for QPRTs. For extensive discussion of QPRTs, see California Estate Planning §§25.29-25.30 (Cal CEB 2002) and Drafting California Irrevocable Trusts, chap 17 (3d ed Cal CEB 1997).

Creating a family limited partnership or limited liability company (LLC) for a vacation home or other family assets is another option. The senior generation typically occupies the position of general partner or member-manager and thus retains control over the entity. Estate planners without a significant level of expertise are advised to refrain from creating this type of family business entity.

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§5.12 3. Potential Problems

Even though an outright transfer of the vacation home (whether during life or at death) to family members may be the appropriate solution, it nevertheless requires careful planning. If the senior generation retains partial ownership, the entire property may be included in the donor's estate. If the client's estate is large enough to create estate tax issues, removal of the property or a portion of it from the client's estate may be an important goal. A taxpayer's estate will include the value of property transferred during life, by trust or otherwise, if the taxpayer retains a right of possession or enjoyment of the property. IRC §2036(a)(1). This rule can pose a problem when the senior generation transfers the vacation home directly to other family members or to a limited partnership or limited liability company but wishes to retain the right to use the property. The same issue can arise in connection with a QPRT when the settlor continues to occupy the property rent-free after termination of the QPRT term.

California real property tax consequences also may be significant when planning the transfer of a vacation home. If the goal is for the family to retain the property, it is important to minimize any property tax reassessment, because the "cost" of reassessment is not a one-time charge but instead is incurred with each year's property tax payment. The availability of the parent-child exclusion under Rev & T C §63.1 for a transfer that would otherwise constitute a change in ownership for property tax purposes may suggest that transfers be made only to children.

In general, a transfer to a grandchild does not qualify under the parent-child exclusion unless both of the grandchild's parents are deceased. Rev & T C §63.1(a)(3). If, however, the grandparent's son-in-law or daughter-in-law was divorced from the child, the parent-child exclusion will be available for a transfer from the grandparents to the grandchild. Also, if the son-in-law or daughter-in-law was married to the child when the child died but remarried before the grandparent-grandchild transfer was made, the parent-child exclusion will be available for the transfer. See Rev & T C §63.1(c)(3)(C).

NOTE: The parent-child exclusion applies to transfers of a personal residence plus $1 million of other real property. Rev & T C §63.1. The application of this exclusion to "other real property" allows a protection for transfers of vacation homes.

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§5.13 C. Conclusion

An outright transfer of the vacation home during the client's lifetime or in the client's testamentary document can be part of a simple estate plan. However, because most clients will not want to give up ownership and occupancy rights, and because of the estate tax and transfer tax issues discussed in §§5.11-5.12, the creation of an irrevocable trust or other entity to hold the vacation home is often the preferred estate planning technique. The latter type of planning requires a high degree of expertise. The practitioner must evaluate the client's situation and determine whether the client's needs can adequately be met with outright distribution.

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§5.14 IV. FAMILY BUSINESSES

Transferring a family business from one generation to the next presents numerous challenges, many, but not all, of which are tax related. A good business succession plan is one that adapts to the evolving desires, needs, and abilities of the family members as the orderly transfer of the business from one generation to the next takes place. It often includes lifetime transfers as well as transfers at death.

In deciding how to balance their desire to treat all children equally with their wish to leave the child who will participate in the business free to make management decisions without having to consult with his or her siblings, parents are confronted with the following questions:

- Are there sufficient other (nonbusiness) assets available to leave to the child who pursues other activities, so that the child who is active in the business can eventually have complete ownership and management?
- Should the nonactive child receive passive assets of the business (such as real estate or nonvoting stock), thus providing that child with income from the business, but without any management control or responsibility?
- Are there two or more children who wish to become active managers? If so, how well do they work together? Are there different aspects of the business that each might control?
- When should interests in the business be transferred and how should the transferred interests be held?

Succession planning is further complicated if the business involves owners who are not family members, or if a married owner's interest in a closely held business is partly separate and partly community property.

There are no formbooks with fill-in-the-blank business succession plans to simplify these planning challenges. However, once a business succession plan is decided on, it will become apparent which legal documents and transactions are needed to effectuate the plan. Often the plan will include:

- A buy-sell agreement (see §5.15);
- Corporate recapitalization (see §5.16);
- Lifetime transfers of closely held business interests by a gift to a grantor retained annuity trust (GRAT) or an installment sale to a grantor trust (see §5.17); and
- Anticipated use of IRC §§303 and 6166 (and possibly §2032A) to aid the estate of the closely held business owner in providing for the payment of federal estate taxes (see §5.18).

For further discussion of succession planning for family businesses, see Estate Planning for Special Assets, chap 2 (Cal CEB 2004).

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§5.15 A. Buy-Sell Agreement

All business succession plans for a family business should include a buy-sell agreement. A buy-sell agreement will almost always include specific restrictions on who may become an owner. For example, it may provide the majority owner with a right of first refusal on a triggering event such as a gift or sale by a minority owner. It may also provide for a mandatory buy-out of a deceased owner's interest by the surviving owners, as well as a way to fund the purchase of the deceased owner's interest without jeopardizing the viability of the company, such as through life insurance or a long-term loan. For further discussion, see Business Buy-Sell Agreements (Cal CEB 1991).

WARNING: If a married owner's interest in a closely held business is partly separate and partly community property, attempting to make any sort of allocation between separate and community property when entering into a buy-sell agreement is not only complicated but will likely require separate legal representation for each spouse.

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§5.16 B. Corporate Restructuring

A business succession plan may call for a recapitalization of the business entity, *e.g.,* through a conversion of corporate stock into two classes of stock—voting and nonvoting. The parents can retain the voting shares during their lifetimes and make gifts of the nonvoting shares to the children in order to reduce the parents' taxable estates while retaining control of the company. The voting shares might eventually pass to the child who will run the business, leaving nonvoting shares for the child(ren) who will not be active in the business.

Restructuring is a two-step process: The articles of incorporation are amended to authorize issuance of nonvoting common stock, then the nonvoting common stock is transferred to the intended beneficiaries, often either by a gift to a grantor retained annuity trust (GRAT) or by an installment sale to a grantor trust (see §5.17). The transfer allows the shareholder to shift the economic benefit of the shares to his or her descendants without affecting voting control.

NOTE: For restructuring to succeed, the business must generate enough income so that the dividends are enough to satisfy children not involved in the business. Even when the business generates income, the managing child may pay himself or herself a salary and reinvest all of the income so that no dividends can be paid. Because restructuring may cause considerable family disharmony, it may not be a good solution. If there are not enough other assets to distribute to the nonparticipating children, other options should be explored, such as borrowing to buy out the nonparticipants.

For further discussion, see Counseling California Corporations, chap 4 (2d ed Cal CEB 2000).

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§5.17 1. Lifetime Transfers: Gift Tax Considerations

Two techniques to effect a transfer of the nonvoting stock are a gift to a grantor retained annuity trust (GRAT) and an installment sale to a grantor trust.

There are various ways to maximize the amount that passes to the descendants, at the lowest gift and estate tax cost. These include:

- Planning for valuation discounts;
- Creating a grantor retained annuity trust (GRAT); and
- Making an installment sale of the business interests to grantor trusts, which can effectively "freeze" the estate tax value of the business interests held by the parents.

Use of a GRAT or an installment sale to a grantor trust are techniques that minimize current gift tax cost and use as little of the owner's lifetime gift tax exemption as possible.

A GRAT is an irrevocable trust in which the grantor retains a right to annual payments of a fixed amount (which may be expressed as a fixed fraction or percentage of the initial fair market value of the property transferred to the trust as finally determined for federal tax purposes) for a fixed term (*e.g.*, for a specified term of years), and other noncharitable beneficiaries (*e.g.*, the grantor's children) have the right to receive, either outright or in further trust, the property remaining in the GRAT at the end of the term. The creation of the GRAT results in an immediate taxable gift of the remainder interest in the GRAT. The primary estate planning objective is to have the remainder interest undervalued for gift tax purposes. This requires that the assets in the trust grow at a rate greater than the annual rate reflected in the IRS's valuation tables. See IRC §7520. GRATs are an attractive gifting option when the prescribed interest rate is low.

WARNING: The risk is that, if the grantor dies before the end of the term, all property in the GRAT may be part of the grantor's estate for estate tax purposes.

A transfer may also be effected by the owner selling interests in the business to the descendants, or to one or more trusts for their benefit, in exchange for an installment note. The sale can be structured so that there are no immediate income tax consequences, if the trust is structured as a grantor trust for federal income tax purposes. IRC §§671-679; Rev Rul 85-13, 1985-1 Cum Bull 184. If a grantor trust is structured so that the seller-owner is treated as owning the entire trust under the grantor trust rules, the sale to the trust is disregarded for income tax purposes and the seller does not pay income tax on the installment payments he or she receives. Further, unlike a GRAT, the sale is not a gift for gift tax purposes and need not be reported on a gift tax return.

WARNING: There is no statutory authority for a sale to a grantor trust, and the IRS may view this technique as more aggressive for tax purposes than a GRAT. GRATs and installment sales are complex techniques and it is recommended that attorneys without expertise not undertake this type of planning. For comparison of GRAT versus sale to a grantor trust, see Drafting California Irrevocable Trusts §3.44C (3d ed Cal CEB 1997).

NOTE: If the business is subject to a buy-sell agreement (see §5.15), the terms of that agreement should be reviewed in determining the value of a transferred interest in the business. Restrictions in a buy-sell agreement, while generally not fixing the value for gift tax purposes (Rev Rul 59-60, 1959-1 Cum Bull 237), are one factor among many other relevant factors to be considered in determining fair market value for gift tax purposes. *Charles W. Ward* (1986) 87 TC 78, 104.

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§5.18 2. Planning for Payment of Estate Taxes

The estate of a deceased owner of all or a substantial portion of a closely held business must deal with the illiquidity of an asset for which there is no ready market, as well as the valuation of the asset for federal estate tax purposes. A proper buy-sell agreement can address these issues, at least in part, by providing a ready market for the business interest, and perhaps fixing the value for estate tax purposes.

In addition, IRC §§6166, 303, and 2032A provide important techniques designed to aid estates of closely held business owners in providing for the payment of federal estate taxes. However, these provisions will apply only if the value of the decedent's interest in the business meets certain requirements. For example, in order to defer estate taxes under IRC §6166, the value of the decedent's interest in the business must exceed 35 percent of the value the decedent's adjusted gross estate. If an IRC §6166 election is desirable, it is important to plan accordingly during life. See §§5.36-5.37.

Internal Revenue Code §303 provides favorable income tax treatment for redemption of stock that is necessary to pay estate taxes, funeral, and estate administration expenses. Instead of being treated as a dividend to the shareholder, the redemption is taxed at capital gains rates. Because the decedent's shares will receive a new basis under IRC §1014 equal to their date-of-death value, there should be little or no capital gain. Internal Revenue Code §303 redemption treatment, however, is available only if the value of the decedent's stock exceeds 35 percent of the value of the decedent's estate.

Internal Revenue Code §2032A allows for a reduction in value for qualified real estate. Although §2032A is most commonly elected for agricultural property (see §§5.33-5.35), it may also be useful in some nonagricultural estates. The IRC §2032A election is only available, however, if at least 50 percent of the adjusted gross estate consists of "qualified use" real and personal property and 25 percent of the estate consists of "qualified use" real property.

WARNING: Aggressive lifetime gifting of business assets could be counterproductive by reducing the decedent's interest below the percentages necessary to qualify under IRC §6166, §303, or §2032A.

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§5.19 C. Conclusion

If the estate is clearly not taxable and if the proposed distribution does not present significant nontax issues (*e.g.,* if the entire estate is being left to one child), it may be appropriate for the general practitioner to accept the engagement. Otherwise, the general practitioner should decline.

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§5.20 V. FAMILY BUSINESS ENTITIES

In recent years, few topics have generated more discussion, controversy, and confusion within the estate planning community than that of family business entities. For purposes of this chapter, "family business entities" include limited partnerships, corporations, and limited liability companies when these entities are owned entirely by members of the same family, and structured at least in part with estate and gift tax savings in mind. These entities are attractive to clients who wish to make lifetime gifts without giving up control of the property, reduce their gift and estate tax liability, and provide some creditor protection for themselves and for their issue. Properly structured and administered in the right situations, family business entities can achieve all of these goals.

NOTE: The limited partnership law has been revised and recodified as the Uniform Limited Partnership Act of 2008 (Corp C §§15900-15912.07). Application of the Act, which became operative January 1, 2008, is being phased in over a period of time. Existing limited partnerships could elect to be covered by its provisions on or after January 1, 2007. Limited partnerships formed on or after January 1, 2008, are automatically subject to its provisions. On or after January 1, 2010, all limited partnerships will be governed by the Act. The Act has few implications for California estate planners forming family limited partnerships. Two noteworthy aspects of the Act, however, are that it provides a single, self-contained source of statutory authority, and it makes clear that limited partners have no fiduciary duties solely by reason of being a limited partner (Corp C §15903.05).

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§5.21 A. Hypothetical Example

A simple example will illustrate why these entities can be so attractive: Assume Bill and Martha, husband and wife, have an estate worth $10 million, consisting of their house and retirement accounts ($3 million) and their securities portfolio and commercial real estate ($7 million).

Bill and Martha would like to make gifts to their children in order to share some of their wealth and to reduce their estate tax liability. It is important to them that they continue to manage the assets. They have considered making outright gifts of securities and of undivided interests in the real estate, but they understand that this could subject the real property to a forced sale in the event that any of the cotenants encountered creditor or family problems. It would also allow the donees to sell the gifted securities, a portfolio that Bill and Martha have carefully cultivated for years.

Bill and Martha decide to transfer their $7 million worth of real estate and securities to a limited partnership, the "Bill and Martha Family Limited Partnership (FLP)." In exchange, they receive all of the partnership interests, consisting of a 1-percent general partnership interest and a 99-percent limited partnership interest. (This example is intentionally simplified. Bill and Martha would likely create a separate limited liability company or corporation to serve as the partnership's general partner.) As general partners, Bill and Martha have the exclusive authority to manage the partnership. Corp C §15904.06. As limited partners, they have no right to manage the partnership. Corp C §15903.02. They can then make gifts of limited partnership interests to their children without giving up control of the assets.

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§5.22 B. The Benefits: Valuation Discounts, Retention of Control, and Asset Protection

By creating the limited partnership and making gifts of limited partnership interests to their children, Bill and Martha have reduced the gift and estate tax value of their investments substantially, potentially saving hundreds of thousands of dollars in tax. The valuation of property, including limited partnership interests, for gift and estate tax purposes is based on the fair market value of the property. "Fair market value" in this context is defined as the price that a willing buyer would pay and a willing seller would agree to, neither being under any compulsion to buy or sell, and both having reasonable knowledge of relevant facts. Treas Reg §§20.2031-1(b), 25.2512-1. This is an objective test based on hypothetical buyers and sellers, not on what the property is worth to particular family members.

The value of a limited partnership interest may be discounted from its prorata share of partnership assets because the interest has no ready market (a "marketability discount"). In addition, while the limited partners do have some rights (*e.g.,* the right to receive distributions from the partnership), their interest is also subject to an additional discount because the limited partners have no control over the management (the "discount for lack of control"). Thus, limited partnership interests, when valued for gift or estate tax purposes, are typically worth much less than the prorata share of the partnership's underlying assets.

By giving away limited partnership interests, Bill and Martha, as the general partners, continue to have exclusive authority over management of the assets and the timing and amount distributed to the partners.

Should one of the children who has received limited partnership interests from Bill and Martha become subject to a levying creditor, the creditor will have no right to the underlying assets of the partnership (*i.e.,* the securities or real estate) or even the partnership interest. Instead, the creditor will have only the rights of an assignee, and thus will be entitled only to distributions if and when distributions are made to the partners. See CCP §708.310; Corp C §15907.03.

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§5.23 C. The Risk: IRS Attack on Valuation Discounts

The IRS has consistently attacked the valuation discounts that practitioners have asserted for partnerships and other closely held enterprises, especially when the enterprises are not traditional businesses. See, *e.g.,* Field Service Advice 200143004, in which the IRS reasserted several arguments against valuation discounts in family-owned entities despite a number of defeats in the courts. See also Appeals Coordinated Issue Settlement Guidelines: Discounts for Family Limited Partnerships (Oct. 20, 2006), UIL No. 2031.01-00, available at http://www.irs.gov/pub/irs-utl/asg_penalties_family_limited_pships_finalredacted10_20_06.pdf. The guidelines provide a review of case law in this area from the Service's perspective. IRS appeals officers must receive the review and concurrence of the appeals coordinator before finalizing settlements with taxpayers involving issues addressed in the guidelines.

The IRS has achieved the most success in the courts using IRC §2036(a), which provides that a decedent's gross estate includes any property transferred by the decedent, excluding transfers by bona fide sale for full and adequate consideration, in which the decedent retained either (1) the possession or enjoyment of the property or right to income of the property, or (2) the right, alone or in conjunction with any other person, to designate the persons who could possess or enjoy the property or its income. See, *e.g., Estate of Bigelow v Commissioner* (9th Cir 2007) 503 F3d 955; *Estate of Korby v Commissioner* (8th Cir 2006) 471 F3d 848; *Estate of Albert Strangi,* TC Memo 2003-145, aff'd (5th Cir 2005) 417 F3d 468 (Strangi II); *Estate of Wayne C. Bongard* (2005) 124 TC 95.

In contrast, several cases have established that if there are legitimate and significant business or nontax purposes for forming the partnership, a transfer of assets to the partnership will be treated as a bona fide sale for adequate and full consideration, thereby entirely excluding the partnership from IRC §2036(a)(1)-(2). See, *e.g., Kimbell v U.S.* (5th Cir 2004) 371 F3d 257; *Estate of Erma V. Jorgensen*, TC Memo 2009-66; *Estate of Anna Mirowski*, TC Memo 2008-74; *Estate of Charles P. Schutt,* TC Memo 2005-126.

For further discussion of business entity valuation planning strategies, see Estate Planning for Special Assets, chap 1 (Cal CEB 2004).

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§5.24 D. Importance of Change of Ownership Rules

Creating a family business entity that will hold California real property requires a firm grasp of the rules governing changes in ownership of real property held in entities. The rules that apply to transfers of interests in entities are entirely different from the more familiar exclusion from reassessment for transfers between parent and child. See Rev & T C §§62-64. For example, generally the transfer of interests in real property to or by a legal entity is a change in ownership unless the proportional ownership interests of the transferors and the transferees are exactly the same before and after the transfer. Rev & T C §62(a)(2); 18 Cal Code Regs §462.180(b)(2). See generally California Estate Planning, chap 15 (Cal CEB 2002).

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§5.25 E. Conclusion

Perhaps more than any other aspect of contemporary estate planning practice, proper planning for family business entities requires a practitioner with a very high level of expertise, coordination with other competent advisors such as appraisers and accountants, a highly customized plan that reflects the specific facts of the particular situation, and proper execution and monitoring of the plan. The estate planner who forms and advises such entities should be fluent in gift and estate tax law, partnership income taxation, state corporation, partnership, or limited liability law, and real property taxation law, and must keep up with the changing dynamics of case law and Internal Revenue Service practice.

Given IRS antipathy toward the valuation of family business entities, even an expert in this area should advise clients forming these entities of the risks involved in entering into what the IRS regards as aggressive tax planning.

The author's advice is that any attorney without a high level of expertise should not prepare an estate plan that involves creation of a family business entity.

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§5.26 VI. S CORPORATION STOCK

Subchapter S of the Internal Revenue Code (IRC §§1361-1379) provides special income tax treatment for "S corporations." An S corporation, like a partnership, does not pay income tax. Instead, its shareholders are directly taxed on the income. This differs from the treatment of a "C corporation" (Subchapter C of the Internal Revenue Code (IRC §§301-385)), where income is taxed twice, first to the corporation as earnings, and then to the shareholders when they receive dividends.

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§5.27 A. Eligibility Requirements

To receive favorable tax treatment as an S corporation, the corporation must meet the eligibility requirements of IRC §1361, and all of its shareholders must consent to the S election under IRC §1362(a). S corporations are limited to 100 shareholders, all of whom must be individuals, but there are some limited, very technical, exceptions for trusts. Stock held in a trust may qualify for S treatment if it is taxed as:

- A grantor trust under IRC §§671-679 (IRC §1361(c)(2)(A)(i));
- A Qualified Subchapter S Trust (QSST) (IRC §1361(d)); or
- An Electing Small Business Trust (ESBT) (IRC §1361(e)).

NOTE: An estate may also qualify as an S corporation shareholder. IRC §1361(b)(1)(B).

A grantor trust is a trust that contains certain powers (described in IRC §§671-679) that cause it to be deemed to be owned for federal income tax purposes either by the person who created the trust (the grantor) or by a beneficiary of the trust. In either case, as long as the deemed owner is a U.S. citizen or resident, the trust is qualified to hold S corporation stock. IRC §1361(c)(2)(A)(i). A typical revocable living trust is a grantor trust during the settlor's lifetime, and will continue to qualify as an S corporation shareholder for 2 years after the settlor's death. IRC §1361(c)(2)(A)(ii).

A QSST must provide for distribution annually of all income to one U.S. citizen or U.S. resident beneficiary; during that beneficiary's lifetime, no other beneficiary may receive trust principal. IRC §1361(d)(3)(A)-(B). Thus, neither the typical "family pot" trust for minors nor a bypass trust with discretionary distributions to spouse and issue will qualify as a QSST.

An ESBT offers more flexibility than a QSST because the trust need not be limited to one beneficiary, and the trustee may accumulate income. However, ESBTs have technical requirements that can easily lead to an inadvertent loss of the S election. Furthermore, the S corporation income in an ESBT is taxed as if it were held by a separate trust at a flat rate equal to the highest rate applicable to trusts and estates rather than at the tax rate applicable to the beneficiaries. IRC §641(c).

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§5.28 B. Consequences of Violating S Corporation Rules

If a client's assets include S corporation stock, the practitioner must be careful not to inadvertently lose the preferential income tax treatment of such stock. If even one shareholder is not a qualified S corporation shareholder, the entity loses its status as an S corporation. When the subchapter S rules are violated, the S election is automatically terminated and the corporation is taxed as a C corporation. When S corporation status is lost, the S election cannot be made again for 5 years. IRC §1362(g). An inadvertent termination affects all shareholders of the corporation, not just the shareholder who triggers the disqualification. Although relief may be available from the IRS under IRC §1362(f) for inadvertent termination, relief is discretionary with the IRS.

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§5.29 C. Conclusion

Planning for outright distributions of S corporation stock is probably safe, assuming that this does not increase the number of shareholders above 100 and assuming that the stock is not a major asset of the estate that expert estate planners would usually advise placing in a trust. Creating an estate plan that includes transfer of S corporation stock to a trust, however, should be avoided or referred to a specialist.

PRACTICE TIP: As a practical matter, even the existence of S corporation stock may not be readily apparent. Many clients do not know whether the shares they hold are those of an S or a C corporation, much less its importance when preparing the estate plan. It is therefore incumbent on the attorney to investigate the issue. Whether the corporation has elected S treatment may not be apparent by reviewing the corporation's bylaws. It may even be necessary to review the corporation's income tax returns and speak with the corporation's counsel and accountant in order to obtain a definitive answer.

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§5.30 VII. FARMS, RANCHES, AND VINEYARDS

Estate planning for the client who owns a farm, vineyard, or ranch requires attention to the same personal and tax considerations that exist for any client who owns a business. However, an estate that holds agricultural property will often present unique challenges and opportunities.

NOTE: In §§5.30-5.39, "farm" will be used as a generic term for farms, ranches, and vineyards, unless specific reference is made to one type of enterprise.

It is always helpful to understand how each client's business operates before preparing the estate plan, and this is particularly true when the business is a farm. There are often many components to an agricultural operation (*e.g.,* land use restrictions, government agricultural programs, water rights, mineral rights), any one of which could significantly affect the client's dispositive plan.

The farmer who has children or grandchildren who wish to carry on the operation should have a carefully tailored business plan and an estate plan, both of which reflect this goal; if there are no such descendants, a rather standard estate plan may suffice.

For complete discussion of estate planning for farms, ranches, and vineyards, see Estate Planning for Special Assets, chap 3 (Cal CEB 2004).

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§5.31 A. Nontax Issues

The attorney preparing the farmer's estate plan may face challenging nontax issues. Often it is clear that one child will continue to run the farm and the other(s) will not. The client's desire to treat the children "equally" may conflict with the need to keep the farm intact and operational, because the remaining assets may not provide the nonfarming heirs with an equal share of the estate. A possible solution is to structure an entity that gives the farming family members management and economic interests and gives the nonfarming members only economic interests, with no right to participate in management. This might be accomplished by creating voting and nonvoting corporate shares or general and limited partnership interests, or designating the participating family members as managers of a limited liability company.

NOTE: The interests of actively participating and nonparticipating children often conflict. Farms often do not generate enough income every year to distribute profits. Even when the farm does generate profits, the managing child may pay himself or herself a salary and reinvest all of the income, leaving nothing to distribute. This may cause considerable family disharmony. If there are not enough other assets to distribute to the nonparticipating children, this may be an insoluble problem.

If the farm has multiple owners, bona fide buy-sell agreements may be helpful to shift ownership interests between the heirs if the remaining owners can meet the price and payment terms. Be aware, however, that a buy-sell agreement may automatically trigger acceleration of estate tax that would otherwise be deferred. IRC §6166(g). It may be possible to split up the various farm operations and negotiate long-term leases between the entities, with each group of children owning a different entity. Care must be taken, however, to make sure that the material participation and qualified use requirements of IRC §2032A are met. See §§5.33-5.35. Additionally, when the operations are split into multiple entities, assets of one entity may not be available as collateral for the debts of the other entities, or shareholder approval may be difficult to obtain.

In some situations, the farmer may wish to specify that particular parcels be devised to a certain child or children. This may result in practical problems, such as whether easements may be necessary, whether electricity is available to all parcels, whether mineral rights are to be included in the devise of specific parcels, whether certain parcels cannot be farmed by themselves but are dependent on other parcels for water or access, and so forth. Legal questions must also be addressed, such as whether the proposed division will be within the minimum acreage requirements of the county, whether the proposed distribution would create an illegal subdivision, and whether all of the land is encumbered by one deed of trust. If the estate plan is to provide for specific devises of separate parcels to each child, the plan will have to be reviewed fairly frequently because changes in the farm's operation during the testator's lifetime, county minimum lot size changes, improvement of certain parcels compared with others, and other changes may distort or thwart the testator's intent. Finally, the possibility of toxic waste or chemical contamination on a parcel might require cleanup costs disproportionate to the value of the parcel.

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§5.32 B. Estate Tax Issues

The payment of estate tax may be particularly problematic for the farmer's estate, because such estates are often rather illiquid. If the estate is taxable, it is important to plan for the liquidity needs well before death. Selling a portion of the farm in order to pay estate tax may be impossible under local land use restrictions, or may jeopardize the continued existence of the farm as a viable enterprise. When estate taxes are likely to be an issue, the attorney should be knowledgeable about several possible estate planning techniques, including those discussed in §§5.33-5.38.

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§5.33 1. Estate Tax Reduction Under IRC §2032A

Internal Revenue Code §2032A provides a valuable estate tax break for owners of small farms, ranches, or vineyards in the form of a statutory reduction in value for "qualified real property." The amount of reduction is adjusted for inflation; in 2009, the amount is $1 million. Rev Proc 2008-66, 2008-45 Int Rev Bull 1107. Although IRC §2032A is not limited to farm property and applies to any business that meets its criteria, it is used most frequently in the agricultural arena, where the difference between the fair market value of land and its "special use" (actual use) value is often the greatest.

The reduction available under IRC §2032A is not an automatic decrease in value. Instead, it is a reduction, if any, from the property's fair market value to its "special use" value that must be elected by the estate. Special use value is essentially the property's value as farmland (or, in the case of a business electing §2032A, its business value), instead of its value under its "highest and best" use. Lifetime gifts of qualified property are valued at fair market value (*i.e.,* not at "special use" value) at the date of gift.

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§5.34 a. Technical Requirements for Qualifying

Qualifying for estate tax reduction under IRC §2032A is extremely technical. Some requirements are basic, *e.g.,* the property must be in the United States (IRC §2032A(b)(1)) and the decedent must have been a U.S. citizen or resident at the time of death (IRC §2032A(a)(1)(A)). Other requirements are more complex, *e.g.,* at least 50 percent of the "adjusted value" of the decedent's gross estate for federal estate tax purposes must consist of the "adjusted value" of real and personal property that was used for farming or in a trade or business ("qualified use") and was acquired from (or passed from) the decedent to a "qualified heir" of the decedent. IRC §2032A(b)(1)(A).

The 50-percent test applies to both qualified real property and qualified personal property. A separate test requires that the qualified real property constitute at least 25 percent of the "adjusted value" of the decedent's gross estate. IRC §2032A(b)(1)(B). The property must have been owned and used in a "qualified use" by the decedent (or a member of the decedent's family) during at least 5 of the 8 years preceding the decedent's death. IRC §2032A(b)(1)(C). There must also be "material participation" by the decedent (or a member of the decedent's family) for at least 5 of the 8 years before the decedent's death. IRC §2032A(b)(1)(C).

Use of IRC §2032A in planning for married couples involves several additional considerations. For example, should IRC §2032A be used when the marital deduction will be used to eliminate tax in the first estate? Should the interest of the predeceased spouse in the farmland be included in the marital share passing to the surviving spouse, or should it be included in the nonmarital share?

Even if all of the requirements for IRC §2032A are met at death, the property must remain in the hands of qualified heirs in a qualified use for at least 10 years after the decedent's death; otherwise, there will be recapture of the estate tax that was saved by making the IRC §2032A election.

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§5.35 b. Careful Advance Planning Is Necessary

Because making the special use election under IRC §2032A is highly technical, careful lifetime planning is required. For example, "material participation" by a qualified heir may turn on whether the property is leased on a strictly cash basis (rent is fixed) or on a crop-share basis (rent is based on the value of the crops produced). The attorney who is unaware of the potential for IRC §2032A qualification might, at the client's request, draft a simple cash lease for the client without realizing that it may foil §2032A qualification.

Otherwise sound tax or business advice could inadvertently cause the estate to lose qualification under IRC §2032A. For example, if the client makes lifetime gifts of undivided interests in the farm's real property, the percentage of qualified real property held at death may be reduced below the required percentage of the gross estate (*i.e.,* 25 percent for qualified real property; 50 percent for qualified personal and real property). For purposes of determining the percentage qualifications under §2032A, gifts made within 3 years of death are included when calculating the value of the adjusted gross estate. IRC §2035(c)(1)(B). Thus, deathbed gifts should not substantially alter the percentages for qualification purposes.

NOTE: The gifts are brought back into the estate for IRC §2032A measuring purposes only; they are not brought back into the gross estate for estate tax purposes.

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2. Estate Tax Deferral Under IRC §6166

§5.36 a. Rules for Qualifying

Another estate tax provision that is often important to farmers is the deferral of estate tax under IRC §6166. An IRC §6166 election allows for payment of estate tax attributable to a farm or small business at a 2-percent interest rate over 14 years, rather than the ordinary rule, which requires payment in full 9 months after the decedent's death. The benefit of an IRC §6166 election is that payment of the estate tax can be deferred for the first 5 years; during that period, interest only is paid at a reduced rate (on the estate tax attributable to the farm or closely held business), and thereafter the estate tax plus interest can be paid in up to ten equal installments. The IRS may require a bond (IRC §6165) or a special lien (IRC §6324A) but has no authority to require a bond or lien for every estate election. See *Estate of Edward P. Roski, Sr.* (2007) 128 TC 113 (Commissioner of IRS abused discretion in adopting bright-line bond requirement); Notice 2007-90, 2007-46 IRB 1003.

Like IRC §2032A, §6166 includes percentage requirements for qualification. To qualify for deferral of estate tax, at least 35 percent of the adjusted gross estate must consist of the decedent's interest in a "closely held business." IRC §6166(a)(1). In contrast to IRC §2032A, ownership of real property is not a prerequisite for the application of §6166. Both IRC §§2032A and 6166 may be used in the same estate—one to reduce the amount of tax payable and the other to defer the payment of the tax.

NOTE: Payment in installments does not apply to the entire estate tax due. The maximum amount of tax that may be paid in installments is the amount that bears the same ratio to the estate tax imposed (reduced by the credits against the tax) as the closely held business amount bears to the amount of the adjusted gross estate. IRC §6166(a)(2).

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§5.37 b. Careful Advance Planning Is Necessary

As with IRC §2032A, the ability to qualify for deferral under IRC §6166 may hinge on actions taken during life—decisions that may have been made independently of and without regard to their impact on the estate plan. For example, the estate may qualify for IRC §6166 deferral if the farm property was leased to others, as long as the decedent was active in managing the operation and the lease was on a crop-share basis. See Rev Rul 75-366, 1975-2 Cum Bull 472. If the decedent was not actively involved and the lease was a cash lease, however, the property would not qualify under IRC §6166. IRS Letter Ruling 9403004. When deciding whether an interest in real property constitutes an interest in a closely held business for IRC §6166 purposes, the "active business" test must be applied separately and independently to each real estate interest owned by the decedent, *e.g.,* as an individual (as a sole proprietor), as the owner of stock in a corporation, or as the owner of an interest in a partnership or limited liability company. See Rev Rul 75-367, 1975-2 Cum Bull 472, revoked in part by Rev Rul 2006-34, 2006-26 Int Rev Bull 1171 (revoked with respect to the portion of that ruling that held that eight houses rented to tenants did not constitute interests in a trade or business); IRS Letter Ruling 8451014.

In determining whether to elect §6166 treatment for a deceased real estate investor, the attorney should review Rev Rul 2006-34. In general, the ruling examines the level and types of services performed by the decedent (or the business entity in which the decedent had an interest) and the services performed by independent contractors. Having nonemployees perform some services will not prevent the business from qualifying as an active trade or business unless the third party activities are so extensive that the activities of the decedent "are reduced to the level of merely holding investment property." Rev Rul 2006-34, 2006-26 Int Rev Bull 1171.

NOTE: In a manner similar to the provisions of IRC §2032A, IRC §2035(c)(2) brings gifts made within 3 years of death back into the estate for purposes of calculating the 35-percent test under IRC §6166.

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§5.38 3. Qualified Conservation Easement

A qualified conservation easement is another alternative that may help prevent a forced sale of the farm property. If the easement is granted during lifetime, an income tax deduction is available. IRC §170(f)(3)(B)(iii). There is also an estate tax reduction available under IRC §2031(c) for estates that hold property subject to conservation easements. Here, too, seemingly unrelated lifetime transactions could affect qualification. Internal Revenue Code §2031(c)(10) provides that the decedent's ownership interest in an entity that owns the land subject to the conservation easement may qualify, as long as the decedent owned at least 30 percent of the entity at death. Transferring the client's interest to such an entity or gifting sufficient percentages in the entity holding the real property might inadvertently disqualify the estate from the reduction in value under IRC §2031(c).

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§5.39 C. Conclusion

The general practitioner who intends to prepare a simple estate plan for a client who owns a farm, ranch, or vineyard should exercise great caution. Because the unique estate tax planning tools used in this context are complex, the attorney probably should decline the engagement if the farmer's estate may be subject to tax or if there are significant nontax issues (see §5.31). Furthermore, if the estate is potentially subject to tax, the client should see a specialist before executing what might otherwise be routine documents, such as leases and corporate formation documents.

The author advises that if the farmer's estate is clearly not taxable and if the proposed distribution does not present significant nontax issues (*e.g.,* the entire estate is being left to the only child), it may be appropriate for the general practitioner to accept the engagement. Otherwise, the general practitioner should decline.

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§5.40 VIII. COMPENSATORY STOCK OPTIONS

Stock options have become a popular way for employers to compensate and retain employees. The advantage to the employer is that, in contrast to additional salary, the grant of the option does not require the outlay of cash. The advantage to the employee is that if the company is successful, the employee may realize significant value from the options.

A compensatory stock option gives the employee who holds the option (the optionee) the right to purchase a specific number of shares of a company's stock at a specific price (the exercise price) within some fixed period of time. Options generally vest over a period of 3 to 5 years. Most options expire 10 years after the date of grant, or sooner in the event of the optionee's death, disability, or termination of service. Typically, the optionee may exercise only the vested portion of an option. If an employee leaves or is terminated before exercising the options, the option plan or agreement determines the employee's rights.

From a federal tax perspective, there are two categories of stock options, incentive stock options (ISOs) and nonqualified stock options (NQSOs). An ISO is an option granted to an individual for any reason connected with his or her employment, if granted by the employer corporation (or its parent or subsidiary), to purchase stock of the corporation. IRC §422(b). It is a form of deferred compensation benefit.

An NQSO (also called a "nonstatutory" stock option) is an option granted in connection with the performances of future services that does not qualify as an incentive stock option. See IRC §83(a).

For further discussion of estate planning for compensatory stock options, see Estate Planning for Special Assets, chap 10 (Cal CEB 2004).

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§5.41 A. Incentive Stock Options (ISOs)

ISOs receive more favorable income tax treatment than NQSOs, but the rules governing them are more restrictive. When an ISO is granted by the employer, the exercise price must be no less than the value of the company's stock on the date the option is granted. IRC §422(b)(4). Neither the grant nor the exercise of an ISO generates ordinary income (or employment) tax consequences for the employer or the employee. IRC §421(a). If the option is exercised at least 1 year after its grant and if the employee holds the stock for more than 1 year after exercise, the employee's sale of the stock at a gain (or loss) is treated as a long-term capital gain (or loss). IRC §422(a)(1). If the employee sells before either of these holding periods, the transaction is taxed at ordinary income tax rates. Even when the sale takes place after the necessary holding periods, and long-term capital gain treatment applies, there may be alternative minimum tax consequences to the employee. IRC §56(b)(3).

Estate planning options for ISOs are limited. Of particular importance to estate planners is the rule that ISOs are not transferable during life. IRC §422(b)(5). The company plan may, however, allow the employee to name a beneficiary to receive the options on the employee's death. This might allow the employee to name his or her revocable trust as the beneficiary of the ISOs, thus avoiding having the options pass through the employee's pourover will. Further, under IRC §421(a), (c), the preferential tax treatment is not lost on the death of the optionee.

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§5.42 B. Nonqualified Stock Options (NQSOs)

Nonqualified stock options receive less favorable income tax treatment than ISOs. The employee who exercises an NQSO must pay ordinary income tax (and employment taxes) on the "spread," which is the difference between the exercise price and the fair market value of the stock when the option is exercised (*i.e.,* when the stock is acquired). Treas Reg §1.83-7. Contrast this with ISOs, for which ordinary income or capital gain treatment does not attach to the exercise of the option, and any gain is taxed only when the shares are sold. Alternative minimum tax treatment may apply on exercise of an ISO.

Even though the income tax treatment of NQSOs is less favorable, they are more flexible than ISOs. For estate planners, the employee's ability to transfer an NQSO during lifetime may provide good opportunities to use the employee's annual gift tax exclusions and lifetime gift tax exemption. However, unlike other outright gifts for which a completed gift typically means that the donor no longer has any income tax connection with gifted property, the *donor* may realize taxable income when the *donee* exercises the NQSO. IRC §83(a). The donee, however, will recognize any gain when the *shares* are sold.

Although an outright gift of an NQSO might appear to be a simple transaction, the proper valuation of the option for gift tax purposes can be quite complex. See, *e.g.,* Rev Rul 98-21, 1998-1 Cum Bull 975, Rev Proc 98-34, 1998-1 Cum Bull 983. In addition, a current gift of NQSOs may have federal securities laws implications. Because securities law regarding the transfer of options is complex, securities counsel should be consulted in connection with any gift of stock options.

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§5.43 C. Conclusion

Estate planning for the client who holds NQSOs or ISOs is not a suitable engagement for the general practitioner. The tax and securities laws are complex for both types of stock options. Further, any estate planning for a lifetime gift of an NQSO should include consultation with a securities law specialist.

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§5.44 IX. RESTRICTED SECURITIES

Founders of companies that have gone public and senior officers and directors of public companies may be subject to special restrictions on the sale of their shares, which are sometimes referred to as "control shares." If the client owns shares in a publicly traded company and did not acquire the shares on the open market (that is, the client owned stock in the company before it went public or before it was acquired by a public company), the client's sale of those shares is often restricted, and the shares are often referred to as "restricted stock." If the client is an officer, director, or large shareholder (5 percent or more) of the company, the sale of the client's shares may be subject to restrictions imposed by U.S. securities law. In some cases, even "junior" employees are covered by federal securities laws, company-imposed policies or agreements that constrain the sale of their shares, or private contractual restrictions on sale.

For complete discussion of estate planning for restricted securities, see Estate Planning for Special Assets, chap 9 (Cal CEB 2004); California Estate Planning, chap 22 (Cal CEB 2002); Organizing Corporations in California, chap 4 (3d ed Cal CEB 2001).

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§5.45 A. Complex Governing Law

There are various constraints involved in estate planning for the holders of publicly traded, restricted securities. These include the Securities Act of 1933 (Securities Act) (15 USC §§77a-77aa), the Securities Exchange Act of 1934 (Exchange Act) (15 USC §§78a-78nn), the federal income tax law, and the federal transfer tax laws. Moreover, the interplay between the securities and tax laws is particularly important.

Several provisions of the federal securities law apply to holders of restricted stock. Each applies to a slightly different group of shareholders, and they frequently overlap. In almost every instance, each provision must be considered separately in the context of particular facts and circumstances. For in-depth discussion, see Estate Planning for Special Assets, chap 9 (Cal CEB 2004).

NOTE: In addition to these generally applicable rules and regulations, there are others that may be relevant in particular circumstances, *e.g.,* SEC Regulation BTR (17 CFR §§245.101-245.104) (dealing with so-called pension fund blackout periods; BTR stands for Blackout Trading Restriction) and the rules of the Financial Industry Regulatory Authority (FINRA), the non-governmental regulatory successor agency to the National Association of Securities Dealers and the regulatory functions of the New York Stock Exchange.

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§5.46 B. Conclusion

Although the general practitioner may never encounter a client who holds securities that are restricted on sale or transfer, the consequences of ignorance in this area are significant. Attorneys involved in the estate planning process need to be aware of potential constraints whenever an investor or executor/successor trustee of an investor is considering the disposition of restricted or control stock.

It is highly unlikely that a simple estate plan will be adequate for a holder of restricted securities. If the answer to any of the following questions is yes, the federal securities laws require attention and the client should be advised by a securities lawyer:

- Is the person a senior officer, director, or employee of the company or a predecessor company? (These shareholders are called "affiliates" and sometimes "control persons," and their stock is called control stock, regardless of how it is acquired. See 17 CFR §230.144(a)(1).)
- If not, does the person own more than 5 percent of the company's shares?
- If not, was the stock acquired by any means other than a purchase through a broker? (These shares are called "restricted stock" or "letter stock" and often have a legend to that effect on the stock certificate if one is issued. See 17 CFR §230.144(a)(3).)

NOTE: Holders of publicly traded securities that are subject to securities law and contractual restrictions also need to focus on the consequence of those restrictions for postdeath administration, because a trustee or personal representative may be faced with many of the same complexities and opportunities faced by the shareholder during his or her lifetime. Naming executors and trustees can be tricky, because the restrictions imposed on the person acting may affect the estate or trust and vice versa.

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Source: Estate Planning/Complete Plans for Small and Mid-Size Estates/5 Problem Assets/§5.47 X. PROFESSIONAL CORPORATIONS

§5.47 X. PROFESSIONAL CORPORATIONS

Under California law, if certain licensed professionals (including physicians, accountants, and attorneys) wish to incorporate their practice, they must do so as a "professional corporation." See Corp C §§13400-13410.

Shares of a professional corporation can be transferred only to another licensed person or to the professional corporation. Corp C §13407. Nevertheless, shares in a professional corporation may be transferred to a revocable trust under the following circumstances (see California Department of Consumer Affairs Legal Opinion 79-5 (1979)):

- The trustee and current beneficiaries of the trust are licensed; and
- A nonlicensed spouse of a licensed spouse-trustee does not have an interest in the trust greater than his or her community property interest in the shares, and the trust instrument specifies that
- the licensed spouse-trustee has exclusive control and powers relating to the shares of the professional corporation; and
- on the nonlicensed spouse's death, the spouses' children (or other beneficiaries) have a beneficial interest, if at all, only in the proceeds that may be received from the shares and not equitable title to those shares.

It is advisable to include special language in the revocable trust instrument that will hold shares in a professional corporation. See Drafting California Revocable Trusts §§19.17-19.18 (4th ed Cal CEB 2003).

AUTHOR'S ADVICE: If the professional corporation includes more than one shareholder, there is likely a buy-sell agreement already in place, and the attorney should review it before preparing the client's estate plan. If the client is the only shareholder in the professional corporation, it is important that the attorney understand the restrictions on transfer imposed by Corp C §13407 when drafting the estate plan.

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§5.48 XI. LAW PRACTICE

If the client is a sole practitioner attorney, it is important to plan for the disposition of the active law practice when the client is no longer able to practice due to disability or death. California law provides for the appointment of a "practice administrator" to handle the incapacitated or deceased attorney's law practice. See Prob C §§2468 (disabled attorney under conservatorship), 9764 (deceased attorney's estate subject to administration), 17200(b)(22)-(23) (deceased or disabled attorney's practice transferred to trust). The practice administrator must be an active member of the State Bar. The personal representative, conservator, or any other person interested in the estate of the deceased or disabled member may bring the petition for the appointment of a practice administrator. Prob C §§2468(a), 9764(a), 17200(b)(22)-(23). The court will appoint the person who was nominated by the disabled or deceased attorney unless the court determines that the appointment would be contrary to the best interests of the estate or would create a conflict of interest with any of the deceased or incapacitated attorney's clients. Prob C §§2468(f), 9764(f), 17200(b)(22)-(23).

AUTHOR'S ADVICE: The estate plan for every attorney who is a sole practitioner should include the nomination of a practice administrator, and preferably at least one alternate. The nomination can be included in the durable power of attorney, the will, or trust.

The powers and duties of a practice administrator are listed in Bus & P C §6185(a); the petition must, however, list the desired powers individually and they must be specifically granted in the order. Prob C §§2468(c), 9764(c), 17200(b)(22)-(23).

NOTE: If no plan has been prepared for the practice of a disabled or deceased sole practitioner under the Probate Code sections discussed above, the State Bar can petition the court under the State Bar Act (Bus & P C §§6000-6238) to take control of a member's files in order to protect the interests of the member's clients if no other member is available to take control of the files. Bus & P C §§6180, 6190-6190.6. The focus of such a proceeding, however, is to protect clients, not to protect the value of a member's practice.

For further discussion of planning for the disposition of a law practice, see Estate Planning for Special Assets, chap 11 (Cal CEB 2004).

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XII. COPYRIGHTS AND PATENTS

§5.49 A. Copyrights

Copyrighted works include original written works, artwork, music, motion pictures, and architecture. 17 USC §102(a). A copyright grants a monopoly to the author for the life of the copyright protection. The 1976 Copyright Act (Pub L 94-553, 90 Stat 2541) uses the term "author" to refer to the originator of all protected works, including music and paintings. For all works created since 1977, copyright protection exists for the author's lifetime plus 70 years following his or her death. 17 USC §302. Under previous law, which still applies to works created before 1978, copyright protection exists for up to 95 years from the date of publication. See Sonny Bono Copyright Term Extension Act (Pub L 105-298, 112 Stat 2827).

A work that is created by an employee within the scope of his or her employment is considered a "work for hire," and the copyright interest is held by the employer, unless the parties agree otherwise in writing. Independent contractors may agree in writing to "work for hire" treatment. 17 USC §101.

NOTE: Under copyright law, the copyright and the object embodying the copyright are two different assets. 17 USC §202. The transfer of the object, *e.g.,* a painting, does not convey the artist's copyright in the painting. Treasury regulations ignore this distinction for income tax purposes but not for estate tax purposes.

For further discussion of patents and copyrights, see Estate Planning for Special Assets, chap 8 (Cal CEB 2004).

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§5.50 1. Transfer Rights

Copyrights are intangible personal property. Ownership of a copyright may be transferred in whole or in part, by conveyance or operation of law, and at death by will or intestate succession. 17 USC §201(d)(1). Copyrights created during marriage are community property under California law. *Marriage of Worth* (1987) 195 CA3d 768, 241 CR 135. As such, they are much like other intangible community property that can be transferred during life or at death.

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§5.51 2. Termination Rights

Federal law imposes certain restrictions on the transfer of copyrights. Although an author can sell or assign his or her interests in the copyright, federal law offers protection for the copyright holder and his or her family. These provisions, called termination rights, apply to inter vivos transfers and prevent the author from effectively assigning all of his or her interests in the copyright.

Termination rights attach to all copyrighted works created since 1977. Under these rules, the author or designated family members may unilaterally terminate a third party's rights in an otherwise valid inter vivos transfer made by the author. The termination rights exist during a 5-year period beginning 35 years after the transfer. 17 USC §203(a)(3). If the author is alive during the 5-year period, the author may terminate the transfer. If the author is not alive during the 5-year period, the author's spouse and/or issue may terminate the transfer.

Termination rights may not be contracted away or waived by the author. Furthermore, the author may not defeat his or her family's termination rights by attempting to assign them to someone else in his or her will. 17 USC §203(a)(5). Termination rights exist only if the author has made an inter vivos transfer. If there has not been an inter vivos transfer, the author's interest in the copyright is fully transferable by will. 17 USC §203(a).

PRACTICE TIP: Because the statute refers specifically to a will, it is not clear that the same provisions would apply if the author employed a revocable trust as a will substitute. If an author wishes to convey his or her interest in a copyright to a revocable trust, it may be advisable to make a testamentary gift of the copyright to the revocable trust under the author's residual pourover clause in his or her will or by a specific devise. For discussion of pourover wills, see California Will Drafting, chap 8 (3d ed Cal CEB 1992).

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§5.52 3. Estate Planning Issues

In planning an author's estate, it is important to know whether the author has made an inter vivos transfer of a copyright interest. If so, the author's family may be able to defeat the transfer by exercising statutory termination rights.

The value of a copyright will depend in large part on the income stream associated with the copyright. If the author's copyrights have substantial value, it may be advantageous to transfer interests in the copyrights during the author's life using limited liability companies or partnerships as control entities. These entities provide the author with the power to continue to exploit the copyrights while gifting or selling interests in the ownership entity to the intended beneficiaries.

NOTE: For estate tax purposes, "qualified contributions" of works of art *can* be made to charitable organizations without conveying the underlying copyright; the property and the copyright interests are considered separately. IRC §2055(e)(*4*).

An outright gift or bequest of a copyright interest to a surviving spouse will qualify for the estate tax marital deduction as long as no other interest in the copyright has passed for less than full and adequate consideration to some other person (IRC §2056(b)(1)(A)) and no other person will enjoy any part of the copyright interest after the copyright interest terminates. See Treas Reg §20.2056(b)-1(c).

Liquidity may be an issue in an estate that includes substantial copyright interests, because federal estate tax is based on fair market value of the assets, and the fair market value of copyrights will be based on future receipts.

For the estate of a successful artist, the appropriate disposition of the artist's rights under CC §986 should be considered. That section provides for a payment equal to 5 percent of the resale price of an item of fine art if certain requirements are met. After the artist's death, the provisions of CC §986 inure to the benefit of "his or her heirs, legatees, or personal representative, until the 20th anniversary of the death of the artist." CC §986(a)(*7*).

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§5.53 B. Patents

Federal patent law allows an inventor who has been granted a patent by the United States Patent and Trademark Office (PTO) the exclusive right to make, use, and sell the invention for 20 years after filing the patent application. 35 USC §§116, 154. Like a copyright interest, a patent is treated as intangible personal property and may be freely transferred. 35 USC §261. Unlike a copyright, there are no termination rights. A patent may be assigned, but the assignment should be recorded with the PTO to protect the assignee from claims by a future bona fide purchaser.

Patents created by a married inventor in California are subject to the general community property rules, divisible at death or in marital dissolution proceedings.

The fact that a patent has a relatively short life (20 years, more or less) does not mean that it is a terminable interest that will fail to qualify for a gift tax or estate tax marital deduction. Although the interest will terminate on a lapse of time (IRC §2056(b)(1); Treas Reg §20.2056(b)-1(b)), an outright gift or bequest of the patent holder's interest will qualify for the marital deduction as long as no other interest in the patent has passed for less than adequate consideration to someone other than the spouse (IRC §2056(b)(1)(A)) and no other person will enjoy the benefits of the patent interest after the termination of the patent (IRC §2056(b)(1)(B)). See Treas Reg §20.2056(b)-1(c).

As with copyrights (see §5.52), liquidity may be an issue in an estate that includes substantial patent interests, because federal estate tax is based on the fair market value of the assets, and the fair market value of patents will be based on future receipts.

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§5.54 C. Conclusion

Copyrights and patents are uncommon assets and rarely encountered in the estates that most estate planners may plan or administer. If the value of the copyright interest or patent is quite modest and the estate is one that the practitioner otherwise feels comfortable handling, the presence of the copyright interest or patent should not preclude the engagement. If the copyright or patent rights are of significant value, however, the attorney should either refer the client to, or associate, an attorney with expertise in estate planning for these assets.

Even if the value of the patent currently seems minimal, the attorney should consider consulting with copyright or patent counsel to make sure that technical rules are followed. For example, maintenance fees must be paid to the Patent Office at predetermined intervals for patents to remain valid and enforceable. Attorneys representing clients with patents should consider consulting with patent counsel to make sure deadlines are not missed.

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XIII. PETS

§5.55 A. Informal Estate Planning Options

A client may request that the estate plan include specific provisions for the proper care of pets (also referred to as "companion animals"). There are several ways to address this. If a responsible, trustworthy person has agreed to care for the animals, the simplest way is to handle the issue informally, by making an outright gift of the animals and funds for their care. If the client does not have anyone who is willing to care for the animals, precatory language can be included in the will or trust that requests that the executor or successor trustee either arrange for their proper adoption or place them with an animal protection organization that will find them permanent homes. The client may also wish to leave funds to the person who adopts the animals. This can be accomplished easily by making a bequest to the person who will receive them, or instructing the executor to make a cash distribution to the person who adopts them. Such a bequest often fills two needs: it is an expression of gratitude to the person who adopts the pets, and it defrays the expenses the caretaker will incur. Thus, it may not trouble the client if the bequest exceeds the actual cost of caring for the animals, because the bequest is intended to be more than reimbursement for the expenses incurred.

If the client chooses the informal approach discussed above, however, there is no assurance that the person receiving the pets (and bequest) will actually keep the animals and properly care for them. For clients who feel that this approach is too informal, a specific trust for pets should be considered. See §5.56.

For further discussion of estate planning for pets, see Estate Planning for Special Assets, chap 6 (Cal CEB 2004).

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§5.56 B. Creating Trust to Provide for Companion Animals

Notwithstanding the fact that an animal is not a "person" under California law, and thus cannot be the recipient of an outright gift (Prob C §§56, 6102), Prob C §15212 authorizes the creation of a trust for the care of a domestic or pet animal. Absent this statute, such a trust would be unenforceable. Unless the trust instrument expressly provides otherwise, the trust terminates when none of the animals remains alive. Prob C §15212(a).

A trust for pets offers advantages over outright distribution of pets and cash, including the ability to designate successor caretakers, provide instructions for the care of the animals, and designate the amount of compensation for caretakers. The statute provides enforcement mechanisms and imposes specific requirements on trustees. A person designated in the trust instrument or, if none is designated, a person appointed by the court, can enforce the intended use of the principal or income. Prob C §15212(c). In addition, any trustee or beneficiary of the trust, person interested in the animal's welfare, or nonprofit animal welfare organization may petition the court regarding the affairs of the trust. Prob C §15212(c). If no trustee is designated, or no designated or successor trustee is willing or able to serve, the court will name one. Prob C §15212(d). Specified parties must receive accountings if the trust assets exceed $40,000 or the court or trust instrument so requires, and must have access to the animal and to the trust's records. Prob C §15212(e)-(f). For complete discussion of the statute's additional requirements and of pet trusts, see Estate Planning for Special Assets, chap 6 (Cal CEB 2004).

NOTE: When ensuring proper care of the client's pets is important, it is advisable to include specific provisions for the care of the pets in documents that address the client's incapacity. The agent under a durable power of attorney and/or the successor trustee of a revocable trust should be authorized to arrange for the care of the animals while the client is incapacitated.

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§5.57 C. Outright Gift to Animal Protection Organization

Clients who do not wish to have a friend or relative care for their companion animals or create a trust for pets may prefer to name an organization as caretaker. A number of California animal protection organizations have programs that provide permanent care or guarantee placement of animals when their owners die or become disabled. For example, the San Francisco Society for the Prevention of Cruelty to Animals (SPCA) has a program available to members called the Sido Service. To enroll companion animals in the Sido program, SPCA members must include language in their estate planning documents giving their animals to the SPCA.

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§5.58 D. Conclusion

If the client is comfortable handling the disposition of pets informally or by an outright gift to an animal protection organization, this can be included in a simple estate plan. Drafting a trust for pets under Prob C §15212 is possible, but the cost may deter pet owners. It remains to be seen how smoothly the enforcement mechanisms under §15212 will function in practice.

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§5.59 XIV. WORKS OF ART AND OTHER COLLECTIBLES

For works of art and other collectibles, the most common estate planning issues are maximizing income tax benefits and obtaining accurate qualified appraisals. A less common problem can arise when the family needs to dispose of a work of art or collectible that has passed informally from one generation to the next and has substantially increased in value.

For discussion of the problem for estate planners whose clients have no idea of the value of their art or collectibles when tax issues related to charitable gifting are not involved, see §6.31.

Clients planning to make charitable gifts of works of art or other collectible items face a number of issues in order to realize the maximum income tax benefits from the gift. In most cases, a work of art is capital gain property for the nonartist taxpayer. However, a work of art is ordinary income property if it was created by the donor or was received by the donor as a gift from the creator. Classification as ordinary income property greatly reduces any available charitable deduction. A work of art that is received by a beneficiary via testamentary disposition is capital gain property because, under IRC §1014, its basis is its fair market value at the decedent's death, and is not dependent on the creator's or collector's basis in the work. See IRC §1221(a)(3)(C). Artwork that is purchased from the artist is also converted into capital gain property, which results in an increased charitable deduction because the collector can deduct the fair market value of the artwork, not just its basis, *i.e.*, its cost.

PRACTICE TIP: When advising a collector who is making a contribution, the attorney should find out how and when the collector acquired the work of art to determine whether the property is ordinary income property.

For charitable gifts of long-term capital gain property, the amount of the income tax deduction depends on how the charity will use the gift. If the use is related to a public charity's exempt function, *e.g.*, the gift of a painting to an art museum, a deduction is allowed for the full present fair market value (with no capital gain on the appreciation). IRC §170(e)(1)(B)(i). The total value of all charitable gifts in a given year is deductible up to 30 percent of the taxpayer's adjusted gross income, and excess deductions can be carried over for up to 5 years. IRC §170(b)(1)(D)(i), (d)(1)(A). If the gift is unrelated to the charity's exempt function, the deduction is limited to the taxpayer's cost basis in the item (IRC §170(e)(1)(B)) and in any case cannot exceed 50 percent of adjusted gross income (IRC §170(b)(1)(A)). If the gift is deductible based on its fair market value, that value must be established by a "qualified appraisal." A qualified appraisal has a long series of technical requirements regarding, among other things, the information to be included, the compensation of the appraiser, the method of appraisal, and the basis for the valuation. Treas Reg §1.170A-13(c)(3). The appraiser must provide an appraisal summary on an IRS form, which must be attached to the donor's income tax return. Treas Reg §1.170A-13(c)(4)(i).

WARNING: Advising clients interested in making charitable gifts of works of art and other collectibles requires not only a thorough knowledge of the IRS requirements, but of the client's current and future income tax situation. Even experienced estate planners will need to consult with the client's income tax preparer in order to obtain all the information the client needs to make an informed decision.

For complete discussion of charitable giving of artwork and other collectibles, see Estate Planning for Special Assets, chap 7 (Cal CEB 2004).

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6

Problematic Situations

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I. INTERNATIONAL AND NONCITIZEN TRANSACTIONS §6.1

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§6.1 I. INTERNATIONAL AND NONCITIZEN TRANSACTIONS

An estate plan that involves transfers to or from persons who are not United States citizens, or who are citizens but not United States residents, can raise a host of complex issues. The greatest danger is that the attorney will fail to realize that international issues exist. This discussion is not a complete explanation of international estate planning, but is instead a summary of some international issues that domestic estate planners are likely to encounter. It is intended to assist in identifying international issues so the attorney can undertake the additional research necessary to properly handle the matter, or else refer it to an attorney who is more experienced in international estate planning, or to foreign estate and tax counsel.

For further coverage of international and noncitizen transactions, see California Estate Planning, chap 16 (Cal CEB 2002).

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A. Noncitizen Clients

§6.2 1. Definitions of Resident and Nonresident

If a client is not a United States citizen, different tax rules will apply depending on whether the client is a resident or a nonresident of the United States.

For income tax purposes, an individual who is not a United States citizen is either a resident noncitizen (also called a resident alien) or a nonresident noncitizen (or nonresident alien), depending on several statutory factors, including a "substantial presence test" that considers time spent in the United States during the calendar year and other factors. See IRC §7701(b). In general, resident noncitizens are treated the same as citizens, *i.e.,* they are taxed on income derived from all sources, including sources outside the United States. IRC §61; Treas Reg §1.871-1(a). Nonresident noncitizens are subject to income tax only with respect to fixed or determinable annual or periodic income derived from United States sources and income that is "effectively connected" with the conduct of a United States trade or business. IRC §871.

The determination of whether a noncitizen is a United States resident for estate and gift tax purposes differs from the determination for income tax purposes. A noncitizen is a resident for estate and gift tax purposes if "domiciled" in the United States. A person is domiciled if he or she lives in the United States, for even a brief period of time, with no definite present intention of leaving. Residence without the intention to remain indefinitely is not domicile, and domicile is not changed by an intention to change it, unless accompanied by actual removal. Treas Reg §25.2501-1(b).

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§6.3 2. Estate and Gift Tax Rules

In general, United States citizens, no matter where they reside, and resident noncitizens of the United States are subject to the same United States estate and gift rules with respect to all of their assets within and outside of the United States. IRC §§2001(a), 2511(a). An estate tax credit may be available with respect to tax paid to a foreign country on property in that foreign country. IRC §2014.

Nonresident noncitizens are subject to United States estate tax only on assets situated within the United States. IRC §§2101(a), 2103, 2511(a). However, nonresident noncitizens are not eligible for the standard estate tax exemption, which exempts the first $3.5 million in 2009. IRC §2010(c). The estate tax credit available to nonresident noncitizens is generally $13,000, which exempts only the first $60,000 of the estate from estate tax. IRC §2102(b). Tax treaties may vary these rules for citizens of signatory countries.

Nonresident noncitizens are subject to U.S. gift tax only on gifts of U.S. real property and tangible personal property located in the United States at the time of the gift. IRC §2511(a). The $1 million lifetime gift tax credit is not available (IRC §2505(a)), but nonresident noncitizens have the benefit of the annual gift tax exclusion (IRC §2503(b)), which is $13,000 in 2009 (Rev Proc 2008-66, 2008-45 Int Rev Bull 1107); the unlimited marital deduction for gifts to a spouse who is a United States citizen (IRC §2523(a)); and the annual gift tax exclusion for gifts to a noncitizen spouse (IRC §2523(i)(2); see §6.9). Nonresident noncitizens may not elect to split gifts. IRC §2513(a)(1).

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§6.4 3. Warnings

An attorney preparing an estate plan for a noncitizen who meets the statutory tests to be a United States resident can generally rely on the fact that the same tax rules apply as in domestic estate planning. The attorney will, however, need to exercise extreme care with respect to any transfers to a noncitizen spouse, as discussed in §§6.6-6.10.

Estate planning for a nonresident noncitizen client presents more serious challenges. The limited estate tax exemption and the gift tax rules create pitfalls and planning opportunities far different from those typically encountered. Most general practitioners will need to refer the matter to, or associate with, experienced international tax professionals.

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§6.5 B. Dual Citizen and Nonresident Citizen Clients

The United States imposes income tax and estate and gift tax on its citizens, whether or not they are residents of the United States. IRC §§1, 2001(a). A person may be a citizen of both the United States and another country, but such a person is still fully subject to United States tax laws. See IRC §§1, 2001(a), 2501(a); Treas Reg §1.1-1.

The primary issue in representing a client who has dual citizenship, or who is a United States citizen but a resident of another country, is that the client may also face taxation in the other country. Foreign tax credits may be available in the United States or the country of residence, and tax treaties between the United States and the country of residence may address any double taxation. The attorney will usually need to bring in other professionals with experience in international taxation and in the internal tax rules of the other country.

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§6.6 C. Transfers to Noncitizen Spouse

Because of the unlimited marital deduction for estate and gift tax purposes (IRC §§2056, 2523), deferring tax and reducing tax rates by transferring assets between husbands and wives is a fundamental element of estate planning for married clients. However, the estate and gift tax rules that apply to transfers to spouses who are not United States citizens differ drastically from those that apply to transfers to citizen spouses.

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§6.7 1. No Standard Estate Tax Marital Deduction

The standard estate tax marital deduction does not apply to transfers to a spouse who is not a United States citizen. IRC §2056(d). The rationale for this exception is that the unlimited marital deduction was not intended to eliminate tax on the estate, only to defer it until the death of the second spouse. If the marital deduction were allowed for transfers to a noncitizen spouse, that noncitizen spouse could return to his or her home country after the transfer and thereby avoid the imposition of estate tax on the second death.

Accordingly, the standard unlimited marital estate tax deduction does not apply to transfers passing to a surviving noncitizen spouse, unless the surviving spouse becomes a citizen before the estate tax return is filed. IRC §2056(d). In addition, the presumption for estate tax purposes that each spouse owned one-half of jointly owned property does not apply to property owned jointly with a noncitizen spouse. IRC §§2040(b), 2056(d)(1)(B).

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§6.8 2. Modified Estate Tax Marital Deduction for Transfers to QDOTs

Although the standard estate tax marital deduction is not available for transfers to a noncitizen spouse, a deduction is allowed for transfers on death to a noncitizen spouse that are made in the form of a "qualified domestic trust" (QDOT). IRC §2056(d)(2).

With a QDOT, the assets are not simply deducted from the deceased spouse's estate and added to the estate of the surviving spouse, as with the standard marital deduction. Instead, the tax is deferred and becomes due when distributions of principal are made to the surviving spouse (with an exception for certain hardship distributions) or when the surviving spouse dies. IRC §2056A(b)(1), (3).

A QDOT must require that all income be distributed to the spouse annually. In addition, at least one trustee of the trust must be an individual citizen of the United States or a domestic corporation and must have the right to withhold the deferred estate tax from any taxable distribution. IRC §2056A(a). Each trustee is personally liable for payment of the tax. IRC §2056A(b)(6). Depending on the size of the trust, the trustee may need to post security for payment of those taxes. Treas Reg §20.2056A-2(d).

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§6.9 3. Annual Gift Tax Exclusion in Lieu of Marital Deduction

The unlimited gift tax marital deduction is not available for lifetime transfers to a noncitizen spouse. IRC §2523(i). There are no provisions in the gift tax law comparable to those in the estate tax law that allow the marital deduction for transfers in the form of a QDOT. There is, however, a special annual gift tax exclusion available for lifetime gifts to a noncitizen spouse. IRC §2523(i)(2). The exclusion amount in 2009 is $133,000. Rev Proc 2008-66, 2008-45 Int Rev Bull 110.

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§6.10 4. Warnings

The estate tax marital deduction for transfers to a noncitizen spouse is an issue only if the decedent's total estate will exceed the unused applicable exclusion amount under IRC §2010 ($2 million for decedents dying in 2008, $3.5 million for decedents dying in 2009). However, if that threshold is met, a number of common estate planning strategies could have catastrophic results when one or both spouses are noncitizens.

For example, a will or revocable trust that leaves property outright or in a QTIP trust to a noncitizen spouse could unnecessarily generate estate tax on the first death. Estate tax could also be generated on the first death if property is allowed to pass on death to the noncitizen spouse by joint tenancy or as community property with right of survivorship or by beneficiary designation. Estate tax could even be imposed on the noncitizen surviving spouse's share of jointly owned property, unless the surviving spouse has maintained records adequate to overcome the IRC §2040(b) presumption and establish that he or she contributed to the costs of acquiring the property.

Even if the value of clients' assets is less than the estate tax exclusion amount, a number of common estate planning techniques may create taxable gifts when one or both spouses are noncitizens. For example, it is not unusual to recommend that spouses transfer property between themselves or transmute property from separate property to community property in order to equalize their estates. It is also not unusual to recommend a change in title from joint tenancy to community property in order to take advantage of more favorable income tax basis rules. When there is a transfer to a noncitizen spouse of the other spouse's separate property or one-half community property share, even those simple strategies could (if the amount transferred to a noncitizen exceeds the special annual gift tax exclusion under IRC §2523(i)(2); see §6.9) generate a taxable gift.

It is essential that every attorney undertaking any estate planning confirm at the outset the citizenship of every client, and every client's spouse. Most estate planners use a client questionnaire or an interview checklist at or before the first meeting with new clients in order to gather necessary information (see §8.10), and those questionnaires and checklists should always include an item asking whether a married client and his or her spouse are both United States citizens. If either spouse is not a citizen, the attorney must understand and be able to apply the rules governing transfers to noncitizen spouses, or refer the clients to a more experienced attorney.

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§6.11 D. Foreign Gifts or Bequests

If an estate planning client intends to benefit children or others who are citizens of a foreign country, or who are citizens of the United States but residents of a foreign country, the primary issue facing the attorney is whether the laws of that country create additional tax burdens or reporting requirements. Referral to or association with tax professionals in the foreign country will likely be required.

If a client will be receiving foreign gifts or devises, the primary issue will be compliance with United States reporting requirements. In general, the United States transfer tax system does not impose tax on a transferee, regardless of the value of the transferred property, and the transferee is not subject to United States income tax on the transfer. IRC §102. However, the receipt by a United States person of gifts from sources other than United States persons must in some cases be reported, and the failure to report those gifts may have serious tax consequences. IRC §6039F. Both citizens and resident noncitizens fall within the definition of a "United States person," but nonresident noncitizens do not. See IRC §7701(a)(30)(A).

Reporting is required if the value of the aggregate foreign gifts received by a United States person (other than a qualified charitable organization) during any taxable year exceeds $10,000 plus cost-of-living adjustments ($14,139 in 2009). IRC §6039F(a); Rev Proc 2008-66, 2008-45 Int Rev Bull 1107. Failure to report can result in severe civil penalties. IRC §6039F(c)(1).

A U.S. citizen or resident or trust can be subject to a special transfer tax on receipt of a gift or inheritance from an expatriate that has not been reported on a timely filed gift or estate tax return. IRC §2801. The tax rate is equal to the highest gift or estate tax rate (45 percent in 2009; IRC §2001(c)), and the tax is reduced by the amount of any gift tax paid to a foreign government. IRC §2801(a), (d).

Compliance with the requirements for reporting foreign gifts and devises will usually require the services of certified public accountants or other tax professionals who are thoroughly familiar with them.

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§6.12 E. Foreign Trusts

Even attorneys whose practices are purely domestic must understand the basic rules governing foreign trusts in order to identify those clients and trusts that are affected by them.

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§6.13 1. Definition of Foreign Trust

The term "foreign trust" means any trust that is not a domestic trust. IRC §7701(a)(31)(B); Treas Reg §301.7701-7(a)(3). A "domestic trust" is a trust that is a United States person. Treas Reg §301.7701-7(a)(2). A trust is a "United States person" when (1) a court within the United States is able to exercise primary supervision over the administration of the trust, and (2) one or more United States persons have the authority to control all substantial decisions of the trust. IRC §7701(a)(30)(E).

WARNING: Application of these statutory rules can create unexpected results. For example, assume that a client establishes a revocable trust and transfers only United States assets to the trust, but names a family member who is a Canadian resident as cotrustee. Because cotrustees must act together, and one of the cotrustees is not a United States person, the trust fails the test for a domestic trust, and is thus deemed to be a foreign trust.

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§6.14 2. Reporting Transfers

In an effort to prevent taxpayers from using foreign trusts to evade tax, the United States imposes special reporting requirements on United States persons (defined in IRC §7701(a)(30) to include both citizens and residents) who are grantors or beneficiaries of foreign trusts.

A United States grantor of a foreign trust must report any transfers to that trust. IRC §6048(a). The United States grantor is also responsible for seeing that the foreign trust files a United States income tax return. IRC §6048(b). A United States beneficiary of a foreign trust must file a special report for any year in which the beneficiary directly or indirectly receives a distribution from the foreign trust, and the beneficiary's return must be consistent with the trust's return. IRC §6048(c), (d)(5).

WARNING: The penalties for failure to comply with the foreign trust reporting obligations can be severe. If a required notice or return is not timely filed, does not include all the required information, or includes incorrect information, a penalty equal to 35 percent of the gross reportable amount may be imposed, in addition to any criminal penalty provided by law. IRC §6677.

The notices and returns required for a foreign trust are complex, and their preparation will require the services of experienced professionals.

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F. Foreign Assets

§6.15 1. Compliance With Foreign Estate Planning Laws

Estate planning for clients with assets in a foreign country, particularly foreign real property, requires particular care. The disposition of those assets is typically controlled by the laws of the country in which they are located, and the client will need competent advice on what legal instruments recognized under those laws would be appropriate to accomplish the client's goals. For example, some countries do not recognize the concept of trusts, and some have "forced heirship" laws, which grant certain family members the right to share in a decedent's estate even if they are expressly omitted from the will. Services of legal counsel in that foreign country will usually be required to ensure that any such laws are considered and that appropriate documents are executed.

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§6.16 2. Tax Issues

United States citizens and noncitizen residents are subject to United States estate tax with respect to all of their assets, including assets outside the United States. IRC §§2001(a), 2511(a). Accordingly, all United States estate tax rules must be considered in planning for the disposition of those assets. For example, if a married client wants to leave assets located in a foreign jurisdiction to the surviving spouse, the transfer must be structured so that it qualifies for the United States marital deduction, and foreign counsel must be properly advised so that the foreign documents meet those requirements.

The estate planner may also need to consider the source of payment of the United States estate tax that is attributable to the foreign assets. Under California law, estate tax is generally equitably prorated among the persons interested in the estate unless the decedent otherwise specifically directs the source of payment of the tax or there is an applicable federal apportionment rule. Prob C §20110. If assets of the taxable estate are not in the possession of the personal representative, the representative has the right and duty to recover the prorated share of tax from the beneficiaries who received those assets. Prob C §20116.

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§6.17 3. Warnings

Even when foreign legal counsel handles the transfer of foreign assets, care must be taken so that the domestic estate planning documents do not nullify any part of the foreign plan. For example, many California wills include a standard provision revoking prior wills. If the client has made a will in a foreign country to dispose of assets there, that standard provision will need to be limited so that it does not inadvertently revoke the foreign will.

When foreign assets will be passing to beneficiaries who are foreign residents, it may be difficult or impossible for the personal representative to recover the prorated share of the estate tax from them. To avoid putting the personal representative in that situation, the will or trust might direct that the tax on the foreign assets be paid from domestic assets, or the client might purchase life insurance payable to the estate to cover that share of the tax.

Ownership of foreign assets may also subject the client to income or transfer tax and reporting requirements in that foreign country. When assets are subject to both United States income or transfer tax liability and foreign tax liability, the foreign tax credit rules and any applicable treaties may eliminate or minimize the burden of that double taxation. Usually, the matter should be referred to another tax professional experienced in international taxation.

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§6.18 II. LARGE RETIREMENT PLANS

Many clients have a significant share of their wealth in retirement plans. As used here, "retirement plan" means a corporate or self-employed pension or profit-sharing plan qualified under IRC §401, an individual retirement account (IRA) under IRC §408, or a tax-sheltered annuity under IRC §403(b). Planning for those clients presents a labyrinth of tax and nontax issues.

For further coverage of retirement plans, including IRAs, see California Estate Planning, chap 21 (Cal CEB 2002).

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§6.19 A. Importance of Beneficiary Designation

The passage of retirement plan assets on death is controlled by the beneficiary designation on file with the plan administrator or custodian at the time of death. If no beneficiary has been named, the assets pass according to the default provisions of the plan documents. Such a "nonprobate transfer" is valid under California law, despite the fact that neither the beneficiary designation nor the plan documents comply with the formalities required for a will. Prob C §5000.

When a client has substantial retirement plan assets, even a properly prepared will or trust will not be sufficient. The estate plan must also consider and coordinate the passage of the retirement plan assets, and the appropriate beneficiary designations must be completed and filed with the plan administrator or custodian.

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B. Tax Treatment

§6.20 1. Both Estate Tax and Income Tax Imposed

Retirement plans are generally included in the taxable estate for estate tax purposes. IRC §2039. Distributions from the retirement plan, when made, are also income in respect of a decedent and taxable income to the recipient for income tax purposes. IRC §§402(a), 1014(c). The result is that retirement benefits may be taxed at more than 70 percent (the combined estate tax rate and income tax rate) before they reach the intended beneficiary.

After the death of a retirement plan participant, the beneficiaries of the retirement plan must take and pay income tax on minimum distributions from the plan, the amounts of which are determined by applying a series of complex statutes and regulations. IRC §401(a)(9). See §§6.21-6.26. Failure to take the minimum distributions results in a 50-percent penalty tax on amounts that should have been distributed. IRC §4974.

NOTE: Naming a charity as the beneficiary of a retirement plan can be a tax-efficient way for a charitably inclined individual to leave plan assets on death, because the charity will receive the distribution free of both estate and income taxes. Further, through tax year 2009 (beginning with tax year 2006), taxpayers who are at least age 70½ can make lifetime IRA distributions of up to $100,000 to certain charitable organizations. IRC §408(d)(8).

The distributions, called "qualified charitable distributions," are excluded from the IRA owner's income (and thus are not deductible as charitable contributions) and are counted as part of the minimum distribution for that year. Notice 2007-7, 2007-5 Int Rev Bull 395. This is a valuable option for taxpayers who wanted to make charitable contributions using IRA assets but whose tax liability on a distribution would not be fully eliminated by the charitable deduction in the current year, because, *e.g.,* they do not itemize deductions, have already exceeded charitable deduction limitations, or are subject to IRC §68 provisions that reduce allowable itemized deductions for certain taxpayers.

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§6.21 2. Determining Postdeath Minimum Distribution Rules

One factor in determining postdeath minimum distribution rules is whether the participant died before or after his or her "required beginning date" (RBD). With some exceptions, the RBD is April 1 of the year following the year in which the participant attains age 70½. IRC §401(a)(9)(C).

A second key factor in applying the minimum distribution rules is whether the benefits pass to a designated beneficiary. "Designated beneficiary" has a particular meaning in the context of retirement plans; not every beneficiary that is designated is a "designated beneficiary." In general, only individuals can be designated beneficiaries. IRC §401(a)(9)(E); Treas Reg §1.401(a)(9)-4, A-1. An estate is not a designated beneficiary (Treas Reg §1.401(a)(9)-4, A-3), and neither is a charity.

A trust is not a designated beneficiary, although under some circumstances the beneficiaries of the trust will be treated as if they had been named directly as beneficiaries of the retirement plan. The trust must meet certain technical requirements, including the requirements that the trust must be valid under state law and irrevocable, that its beneficiaries must be identifiable from the trust instrument, and that certain documentation must be provided to the plan administrator. Treas Reg §1.401(a)(9)-4, A-5. To be designated beneficiaries, all the trust beneficiaries who could receive distributions of assets received from the retirement plan must be individuals. Treas Reg §1.401(a)(9)-4, A-1, A-5(b)(3). That could include remainder beneficiaries. Treas Reg §1.401(a)(9)-5, A-7(c)(3), Example 2.

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§6.22 a. Distribution to Surviving Spouse

Special rules apply to surviving spouses and generally favor naming the surviving spouse as sole outright beneficiary. On the owner's death, the spouse may treat an IRA as his or her own, or—with the same effect—may roll over the IRA into an IRA in his or her own name. IRC §401(c)(9); Treas Reg §1.408-8, A-5, A-7. In either case, the surviving spouse can name designated beneficiaries, and the minimum distribution rules will be applied using the uniform tables, which reflect the current life expectancy of the spouse and a hypothetical beneficiary who is 10 years younger, and then on the single life expectancies of his or her designated beneficiaries. This typically provides an extended period of tax deferral. If the designated beneficiary is the spouse, the beginning of distributions can be deferred until the participant would have attained age 70½. IRC §401(a)(9)(B)(iv). (This rule is irrelevant if the benefit is rolled over into an IRA belonging to the spouse.)

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b. Distribution to Nonspouse Beneficiary

§6.23 (1) Rollovers Allowed

Before enactment of the Pension Protection Act of 2006 (Pub L 109-280, 120 Stat 780), a beneficiary other than a spouse could not roll over a retirement plan account into an IRA. That often created a problem because the governing documents of many pension plans—whose sponsors do not want to administer retirement plan accounts for a deceased employee's beneficiaries—require that distributions be made within a short period after the employee's death, even when that is sooner than would otherwise be required under the minimum distribution rules. Although a spouse named as beneficiary could in those circumstances avoid the distribution by rolling over the account into an IRA, a nonspouse beneficiary was forced to take distribution of the account within the time required by the plan documents and thus incurred the immediate income tax liability.

After December 31, 2006, the Pension Protection Act of 2006 allows a domestic partner or other nonspouse designated beneficiary (*e.g.*, child, sibling, parent, friend) to avoid such a distribution by making a direct rollover of the inherited retirement plan into an IRA. IRC §402(c)(11). The beneficiary is not taxed at the time of the rollover, but only as distributions are taken from the IRA. This option is available only if the pension plan documents provide for such a rollover. Notice 2007-7, 2007-5 Int Rev Bull 395. However, effective for plan years beginning after December 31, 2009, distributions to a nonspouse beneficiary's inherited IRA are considered "eligible rollover distributions," and plans are thus required to allow these direct rollovers. IRC §402(f)(2)(A), (c)(11), as amended by Pub L 110-458, 122 Stat 5092, §108(f). Further, unlike a spousal rollover, which the spouse can treat as his or her own retirement plan (IRC §402(c)(9)), the nonspouse beneficiary's IRA is treated as an inherited IRA and must be titled in the name of the deceased employee (IRC §402(c)(11)(A)(ii)).

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§6.24 (2) Distribution Rules

If the designated beneficiary is not the surviving spouse and the participant dies before the required beginning date (RBD), the distributions may be taken over the life expectancy of the designated beneficiary, provided that distributions begin within 1 year after the participant's death. IRC §401(a)(9)(B)(ii)-(iii); Treas Reg §1.401(a)(9)-3, A-4(a)(1). If the designated beneficiary is not the surviving spouse and the participant dies after the RBD, the distributions may be taken over the longer of the life expectancy of the beneficiary or the life expectancy of the participant. Treas Reg §1.401(a)(9)-5, A-5(a)(1). If there are multiple designated beneficiaries, the life expectancy of the oldest designated beneficiary is used to determine the required minimum distributions. Treas Reg §1.401(a)(9)-5, A-7(a)(1).

If there is no designated beneficiary and the participant dies before the RBD, the retirement plan assets must generally be distributed within 5 years. Treas Reg §1.401(a)(9)-3, A-1. If, on the other hand, the participant dies after the RBD and there is no designated beneficiary, the retirement plan assets must generally be distributed over the participant's hypothetical life expectancy using the age the employee attained (or would have attained) in the calendar year of death. Treas Reg §1.401(a)(9)-5, A-5(a)(2). The life expectancy is determined using the Single Life Table in Treas Reg §1.401(a)(9)-9, A-1.

NOTE: The Worker, Retiree, and Employer Recovery Act of 2008 (Pub L 110-458, 122 Stat 5092) added a new IRC §401(a)(9)(H) that eliminates the need for participants and beneficiaries to take 2009 required minimum distributions from most retirement plans. If a beneficiary of a retirement plan is required to withdraw the entire balance of the plan over 5 years because the participant died before the RBD, calendar year 2009 is not counted, resulting in a 1-year extension of the 5-year withdrawal period.

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3. Warnings

§6.25 a. General Considerations

Estate planning for clients with large retirement plans raises a host of issues. The attorney will need to advise the client on the importance of making the appropriate beneficiary designation for each plan. Many plan administrators and custodians have their own specific forms to complete and procedures to follow for a beneficiary designation to be valid. The attorney must be prepared to comply with all of those requirements on behalf of the client, or else clearly delegate the task of compliance to the client or to one of the client's other professional advisers.

As discussed in §§6.22-6.24, it may be possible under some circumstances to defer withdrawals from the plan (sometimes referred to as a "stretch out") and thereby defer income taxation, allowing the plan assets to grow on a compounded basis and without reduction for current income taxes. However, if plan assets must be withdrawn shortly after death in order to pay estate tax, current income taxation on those withdrawals is unavoidable. In some cases, the client might consider the purchase of life insurance (to be owned by an irrevocable life insurance trust or other arrangement so that the insurance proceeds are excluded from the taxable estate) in order to fund the payment of estate tax without forcing current withdrawals from the retirement plan.

Whenever a client has significant assets in a retirement plan, or when spouses do not have sufficient assets outside of retirement plans to fully fund a bypass trust (see §6.26), the complexity of the applicable rules and the variety of estate planning issues they create typically require a referral to, or association with, experienced tax planning professionals.

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§6.26 b. Considerations for Married Couples

Under the postdeath minimum distribution rules, the most favorable income tax results are most likely to occur when individuals, not trusts, are named as beneficiaries of the retirement plans. This suggests, for example, that the typical married client with substantial retirement plan assets should name the surviving spouse as primary beneficiary of the plan and a child as contingent beneficiary. However, the client may intend to have all assets going to the spouse pass in the form of a QTIP trust. Also, the children may be incapable of properly managing those assets, and it would be more appropriate to have them paid to a trust for the child. In such circumstances, the estate planner needs to fully advise the client of the consequences of each option so that the client can make an informed decision that properly balances both the tax and nontax objectives.

A particular problem is posed when a husband and wife do not have sufficient assets outside of retirement plans to fully fund a bypass trust (see chap 3). To the extent that assets are withdrawn from a retirement plan to fund the bypass trust, there will be an immediate realization of those assets for income tax purposes. Several strategies have been proposed to avoid that result, such as relying on the aggregate theory of community property to preserve the retirement plan intact and fully fund the bypass trust with other assets.

NOTE: Although most attorneys feel comfortable advising clients that a nonprorata allocation of community property is not a taxable event, they should nevertheless advise clients in writing that the IRS may assert the contrary position. Because of the uncertainty, more cautious attorneys simply refuse to do nonprorata allocations of appreciated community property assets.

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§6.27 III. INTERESTS IN TRUST CREATED BY OTHERS

When an estate planning client is receiving or will receive distributions from a trust created by another person, or otherwise has an interest in such a trust, that interest may or may not be relevant to the client's plan. For example, if the client has an income interest that terminates on death, there may be little for an estate planner to do with respect to that other trust. By contrast, if the client holds a power of appointment (see §§3.30, 6.28-6.29) over the trust, there can be significant tax and nontax issues.

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§6.28 A. Powers of Appointment

A power of appointment is the power to direct the enjoyment of property held in a trust. Many trusts grant a power of appointment to a beneficiary to give that beneficiary some control over the ultimate disposition of the trust property.

A power of appointment is a general power of appointment if it permits the holder to exercise it in favor of the holder, the holder's creditors, the holder's estate, or creditors of the holder's estate. Prob C §611(a). For example, a parent might create a trust for a child that will continue for the child's life, and on the child's death will be distributed as the child directs in his or her will. That child holds a general testamentary power of appointment over the trust because there are no limitations on how the child can direct the property.

A power of appointment that is not general is a special power of appointment, also called a limited power of appointment. Prob C §611(d). In the preceding example, if the trust provided that the property would be distributed on the child's death as the child directs among his or her issue, the power would be a special power of appointment because it could only be exercised in favor of a class of persons not within those listed in Prob C §611(a).

The exercise of a power of appointment must comply with any requirements set out in the instrument that created it. Prob C §630. For example, the will, trust agreement, or other instrument that creates a power of appointment might allow the power to be exercised by any signed writing delivered to the trustee, or it might require that the power be exercised by the will of the holder of the power. In either case, the document creating the power often requires the holder of the power to expressly refer to the creating document when exercising the power.

Unless restricted by the instrument creating the power of appointment, the holder of the power may exercise it by creating another trust. Prob C §650(a)(5). For example, a child holding a power of appointment under his or her parent's trust may be able to exercise that power to create a new ongoing trust for the benefit of his or her children.

For further discussion of powers of appointment, see California Estate Planning, chap 9 (Cal CEB 2002).

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§6.29 B. Transfer Tax Effects of Powers of Appointment

The distinction between a general and a special power of appointment is crucial in the analysis of estate and gift tax consequences for the holder of the power. For estate tax purposes, the gross estate includes the value of property over which the decedent held a general power of appointment at the time of death, whether or not that power was exercised. IRC §2041. The exercise of a general power of appointment during life is a taxable gift. IRC §2514(b). See chap 3 for discussion of estate and gift taxes.

Powers of appointment are used extensively in planning for the generation-skipping transfer (GST) tax. See chap 3 for discussion of GST tax. For example, when no GST exemption is available, a child who is a beneficiary of a trust is sometimes granted a general testamentary power of appointment over the trust property. Because the trust property will be subject to estate tax on the child's death, and therefore will not be subject to GST tax, there can be a reduction in the total amount of transfer taxes. Alternatively, when the GST tax exemption will be allocated to a trust, granting the child a limited testamentary power of appointment will allow the child some control over the ultimate disposition of the trust assets without generating either an estate tax or GST tax on the child's death.

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§6.30 C. Warning

As part of any estate planning questionnaire or interview, a practitioner must determine whether the client has a current interest in a trust that was created by the client's parent or other third party. If so, that trust document should be reviewed to determine whether that interest should be treated as part of the client's estate plan and, if so, how. If applicable, the attorney will also need to advise the client on the estate tax, gift tax, and GST implications of the interest. Even if there are no tax issues, the identification and proper exercise of a power of appointment may be necessary to achieve the client's estate planning goals.

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§6.31 IV. VALUING PERSONAL PROPERTY

Most clients have only a vague idea of the value of their artwork, collections, and other tangible personal property. For most clients, this does not present a problem. For the client who holds valuable artwork or collectibles, however, or any other potentially valuable property with unknown worth, it may be difficult to prepare an estate plan "in the dark." Will there be estate taxes on the client's death because of the value of the artwork or other collectibles? If so, will that affect the distribution of these items, particularly if many are specifically devised? How should the estate tax burden be allocated?

AUTHOR'S ADVICE: If the client has no idea of the value of his or her assets, it will be difficult to prepare the client's estate plan. The fee to hire a professional appraiser who is knowledgeable about the specific assets in question may be money well spent. If the client refuses to obtain appraisals, the attorney may proceed, but only after documenting repeated efforts to have the clients obtain at least approximate fair market values for the items and repeated explanations to the client of the kinds of unforeseen and unintended results that this lack of accurate information might produce.

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§6.32 V. REAL PROPERTY TAXATION ISSUES

The rules governing changes in ownership of real property can lead to unexpected adverse results, even with commonly used estate planning techniques. Even in estates for which there will be no estate tax due, a transfer that triggers reassessment can cause a substantial increase in the property taxes that the beneficiaries will have to pay every year. An attorney handling any estate plan involving California real estate should be thoroughly familiar with the change in ownership rules and should advise the client of any adverse property tax consequences that may result from any recommended course of action. Many of the most common transfer tax problems are discussed in chap 3.

For further coverage of real property tax issues, see California Estate Planning, chap 15 (Cal CEB 2002).

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VI. GIFTS TO DISQUALIFIED PERSONS

§6.33 A. Statutory Prohibition and Exceptions

California law includes a series of statutes intended to protect estate planning clients against overreaching by their lawyers and other trusted persons. With limited exceptions, provisions of wills and trusts that make gifts to those "disqualified persons" are invalid. Disqualified persons include (Prob C §21350):

- The person who drafted the instrument;
- A person who is related by blood or marriage to, is a domestic partner of, is a cohabitant with, or is an employee of the drafter;
- Any partner, shareholder, or employee of any law partnership or law corporation in which the drafter has an ownership interest;
- Any person who has a fiduciary relationship with the transferor (*e.g.*, a conservator or trustee) who transcribes the instrument or causes it to be transcribed. The term "causes it to be transcribed" has been interpreted to refer only to the person who directs, oversees, or otherwise participates directly in the transcription, not to a person who merely procures the drafting attorney, or who facilitates the drafting without being directly involved. *Rice v Clark* (2002) 28 C4th 89, 105, 120 CR2d 522.
- A person who is related by blood or marriage to, is a domestic partner of, is a cohabitant with, or is an employee of a person described in the immediately preceding paragraph;
- A care custodian of a dependent adult who is the transferor; or
- A person who is related by blood or marriage to, is a domestic partner of, is a cohabitant with, or is an employee of a care custodian.

There are exceptions when the otherwise disqualified person is related to the transferor by blood (within the fifth degree) or by marriage, or is the registered domestic partner or cohabitant with the transferee or the person who drafted the will. Prob C §21351(a), (g).

A transfer to a person who would otherwise be a disqualified person is valid if it has been reviewed by an independent attorney who counsels the transferor about the nature of the intended transfer, attempts to determine that the gift is not a result of fraud, duress, menace, or undue influence, and signs and delivers to the transferor a Certificate of Independent Review in the form set out in the law. Prob C §21351(b). A transfer to a disqualified person is also valid if approved by the court, after full disclosure of the relationships involved and on clear and convincing evidence—which cannot be based solely on the disqualified person's testimony—that the transfer was not the product of fraud, duress, menace, or undue influence. Prob C §21351(d)-(e).

For further discussion, see California Trust and Probate Litigation, chap 6A (Cal CEB 1999).

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B. Warnings

§6.34 1. Gift to Care Custodian

A "care custodian of a dependent adult" is a presumptively disqualified person (Prob C §§21350(a)(6), 23151(d)), but it is not always clear whether a prospective donee falls within that description. In *Bernard v Foley* (2006) 39 C4th 794, 47 CR3d 248, a divided California Supreme Court, in a 4-to-3 decision, held that when an unrelated person renders substantial, ongoing health services to a dependent adult, that person may be a care custodian for purposes of the disqualified-person statutes, even if the service relationship between the individual arose out of a preexisting personal friendship rather than a professional or occupational connection. The court expressly disapproved *Conservatorship of Davidson* (2003) 113 CA4th 1035, 6 CR3d 702, to the extent it interpreted Prob C §21350 as allowing an exception for a preexisting personal friendship. The court nevertheless emphasized that *Bernard* was not a case in which, as in *Davidson,* preexisting friends who were testamentary beneficiaries of a testator later became care custodians. The court also emphasized that the presumption of Prob C §21351 does not prohibit care custodians from receiving gifts; "it is simply a protection against their seeking or obtaining gifts by fraud, menace, duress or undue influence." 39 C4th at 815.

The 4-person majority included a concurring opinion, in which Chief Justice George encouraged the legislature to consider modifying or augmenting the relevant provisions to accord different treatment to longer-term care custodians who "undertake that role as a consequence of a personal relationship rather than as an occupational assignment."

In *Estate of Odian* (2006) 145 CA4th 152, 6 CR3d 702, the court of appeal applied *Bernard* to find that a decedent's "paid live-in companion" was a care custodian within the meaning of Prob C §21350(a)(6) and Welf & I C §15610.17(y), even though the companion had never previously worked as a caregiver and rendered only "social services," such as cooking, cleaning, shopping, and driving.

An attorney whose client intends to make devises to any persons who perform personal services should review the statute and case authorities to determine whether the rules involving disqualified persons apply. If they do, it would be prudent to advise the client to obtain a certificate of independent review.

If the drafting attorney is otherwise independent, the law does not appear to prohibit the same attorney from signing the Certificate of Independent Review, although the statute is not explicit on that point.

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§6.35 2. Gifts to Attorney Who Drafts Documents

A problematic situation occurs when a client wants to make a testamentary gift to the attorney drafting the instrument, or to a partner of the attorney drafting the instrument, and none of the exceptions to the definition of disqualified person applies. Obviously, the attorney is never independent with respect to gifts to himself or herself, or to his or her partners and employees. Also, the statutory procedure that allows a court to approve an otherwise invalid gift on a showing that the gift was not procured by fraud, menace, duress, or undue influence does not apply to a gift to the drafter of the instrument. Prob C §21351(e)(1).

The law allows such gifts if an independent attorney provides a Certificate of Independent Review. As a practical matter, however, it is often difficult to find an attorney willing to undertake the independent review, particularly because there is no clear authority as to the scope of the investigation the attorney is required to make in order to comply with the statutory requirement that the attorney attempt "to determine that the gift is not a result of fraud or undue influence." Even if another attorney is willing to make the independent review, the client is usually reluctant to spend the additional time and bear the additional costs of involving a second attorney. Most practitioners simply refer the client to an independent attorney to prepare the documents.

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VII. ESTATE PLANNING TO BENEFIT DISABLED PERSONS

§6.36 A. Challenges and Pitfalls

It is dangerous to dabble in the field of estate planning to benefit disabled persons. Many attorneys mistakenly do not plan, or inadequately plan, for the disabled beneficiary. An outright devise or gift to a disabled beneficiary or a poorly structured trust established for the benefit of a disabled person may well, for example:

- Fail to provide an effective system for care and advocacy over the beneficiary's lifetime.
- Disrupt the beneficiary's receipt of Supplemental Security Income (SSI), Medi-Cal, and related government benefits for months. Once disqualified, an individual must reapply to reestablish these benefits. The process is complex and time-consuming. For disabled persons who require consistent, ongoing medical care and physical or educational therapy, interference with the flow of benefits may have serious, even life-threatening, consequences.
- Cause assets to be rapidly consumed to pay for basic needs (food, shelter, treatment, therapy, special equipment, medical care, health and home care aides, or nursing home care) that government benefits would have covered. Under a proper plan, the assets could be used to supplement government benefits over the disabled person's lifetime.

Parents sometimes propose leaving assets to a disabled child's nondisabled sibling, with a request to assist the disabled sibling as needed. Even well-intentioned siblings, however, may mismanage the money, misunderstand the public benefit issues involved, spend the inheritance on themselves and their family as needs arise, unexpectedly lose the assets to creditors, or die without leaving the assets to the disabled sibling. Over a long period of time, the sibling may come to resent the heavy responsibility involved. This sort of lack of planning leaves many disabled persons destitute and often causes extreme family disharmony.

For a thorough discussion of all aspects of planning for a disabled person's assets or inheritance, see Special Needs Trusts: Planning, Drafting, and Administration (Cal CEB 2008).

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§6.37 B. Importance of Preserving Public Benefits by Use of Special Needs Trust

Because many disabled persons are unable to work and are ineligible for private medical insurance because of preexisting conditions, they rely on public benefits for medical coverage and money for living expenses. In California, the most commonly available public benefits for the disabled are Supplemental Security Income (SSI) and Medi-Cal. These public benefits are "needs-based" or "asset-sensitive," *i.e.,* only persons of very limited means are entitled to receive them. They are meant to provide the recipient with a modest amount of food, shelter, and essential medical services, but nothing more.

The primary tool for estate planning to benefit disabled persons is a specialized spendthrift trust, often called a third party "special needs trust" (SNT) or "supplemental needs trust." A well-drafted SNT can preserve a disabled person's public benefits, provide an excellent management team for financial and public benefits management, establish a lifelong system of care and advocacy, and be flexible enough to change with future modifications to the law.

WARNING: Because the SSI and Medi-Cal rules and the statutory requirements for an SNT are complex and change often, a general practitioner or an estate planner without expertise in this area should be particularly wary of acting without associating an expert in this field or should refer the matter to an expert.

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§6.38 C. SSI and Medi-Cal

Both SSI and Medi-Cal are available only to those with minimal financial resources. Persons who are eligible for SSI benefits (see §§6.41-6.44) are automatically eligible for Medi-Cal. Persons not eligible for SSI benefits may be eligible for Medi-Cal only if they are "medically needy." See §6.46. If a person receives SSI or Medi-Cal or SSI benefits while ineligible for them, the benefits received must be repaid. 20 CFR §416.560 (SSI); Welf & I C §14009(c), (e) (Medi-Cal).

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§6.39 1. Legal Authority Governing SSI and Medi-Cal

Both SSI and Medi-Cal are authorized by federal legislation providing the basic program requirements. Although in both programs the state supplements the basic federal grants, SSI is administered by the federal Social Security Administration (SSA), whereas Medi-Cal is state-administered. The attorney must consult both state and federal legal authority regarding both programs. Rules and procedures for the two programs differ and are complex and ever-changing. Keeping current in this area of law can be difficult even for specialists in the field.

For SSI, the basic sources are 42 USC §§1381-1383f and 20 CFR §§416.101-416.2227; Welf & I C §§12000-12351 (state supplement). For Medi-Cal, the sources are 42 USC §§1396-1396v and 42 CFR §§430.0-456.725 (federal Medicaid); Welf & I C §§14000-14029.5 and 22 Cal Code Regs §§50000-50966 (pertinent parts of state Medi-Cal). In addition, draft regulations, though not officially published, are sometimes used by the administering departments pending issuance of final regulations.

Administration of both SSI and Medi-Cal are also subject to agency administrative guidelines, which change frequently:

- The Social Security Administration's Program Operations Manual System (POMS) governs administration of SSI. POMS guidelines are available on the SSA's website at http://policy.ssa.gov/poms.nsf. Although the POMS are not the product of formal rule-making and are not law, the United States Supreme Court held that POMS "warrant respect." *Washington State Dep't of Soc. & Health Servs. v Guardianship of Keffeler* (2003) 537 US 371, 385, 154 L Ed 2d 972, 986, 123 S Ct 1017. Furthermore, representatives at local Social Security district offices turn to POMS for guidance when faced with issues affecting an SSI claimant.

- Administration of Medi-Cal is governed by All-County Welfare Directors (ACWD) Letters, which are issued by the California Department of Health Care Services (DHCS) (formerly Department of Health Services (DHS)) and sent to county departments of social services. ACWD Letters are available on the DHCS website at http://www.dhs.ca.gov/mcs/mcpd/MEB. Medi-Cal is also governed by the guidelines in the State Medicaid Manual of the federal Centers for Medicare and Medicaid Services (CMS), which administers the Medicaid program. The manual is available on the CMS website at http://www.cms.hhs.gov/manuals.

WARNING: The public benefit statutes, regulations, and policies are rife with contradictory directives and guidelines, and local program administrators cannot be relied on for authoritative advice. In addition, because the law in this field is so fluid, the drafting attorney cannot confidently predict what law will govern when the settlor dies. The need for expertise in this area cannot be overemphasized.

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2. SSI

§6.40 a. Benefits

SSI provides a modest monthly cash grant for food and shelter to disabled, blind, or elderly persons. It is intended to supplement the recipient's income up to a maximum amount defined by regulation. The amount of benefits changes annually, as determined by guidelines in 20 CFR §§416.401-416.435 (see 20 CFR §§416.410 (individual rate), 416.412 (eligible couple rate)). These payments are increased by a state supplement administered by the Social Security Administration. For federal regulations governing state supplements, see 20 CFR §§416.2001-416.2099. The annually adjusted benefit amounts are published in the Federal Register each February, effective April 1.

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§6.41 b. Eligibility

SSI eligibility requirements are described in 20 CFR §§416.200-416.269. The applicant must be disabled, blind, or over age 65 (20 CFR §416.202(a)) and have no more than the permitted income and resources (20 CFR §416.202(c)-(d)).

Excess income and resources coming to an SSI recipient will cause benefits to be reduced dollar for dollar. 20 CFR §416.420. Therefore, retaining SSI eligibility and payments for a disabled beneficiary requires familiarity with the program's eligibility requirements and system for counting income and resources. The following sections are intended only as a brief introduction to some of the basic requirements.

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§6.42 (1) Resource Limits

The "countable resource" limits for SSI are $2000 for an eligible individual and $3000 for an eligible couple. 20 CFR §416.1205(c). If resources exceed these limits at 12:00 a.m. of the first day of the calendar month, the recipient is ineligible for that month. See 20 CFR §416.1207(a). Income received during the month is counted only as income, not resources, even if deposited into a bank account. It is counted as a resource only if it is retained at the first moment of the next month. 20 CFR §416.1207(d).

Assets are not considered resources unless the applicant has the "right, authority, or power to liquidate the property." 20 CFR §416.1201(a)(1). In addition, assets are not counted as resources if they are specifically exempt. A personal residence owned by the beneficiary is exempt, regardless of its value. 20 CFR §§416.1210(a), 416.1212. Furniture, clothing, and personal care items are generally exempt. 20 CFR §§416.1210(b), 416.1216. An automobile of any value is also exempt (20 CFR §416.1218), as are burial plots, certain types of life insurance contracts, and miscellaneous other assets. 20 CFR §416.1210. The regulations should be consulted for definitions, limitations, and other exemptions.

A common question is whether a beneficiary's trust is counted as a resource for the purposes of SSI. Section 205 of the Foster Care Independence Act of 1999 (Pub L 106-169, 113 Stat 1822) provides that, with few exceptions, trusts will be counted as a resource unless they are established by will with the assets of the individual or the individual's spouse. See 42 USC §§1382a(a)(2), 1382b(e). Accordingly, the SSA's Program Operations Manual System (POMS) states that, for trusts established by an individual on or after January 1, 2000, the trust principal of a revocable trust is generally a resource to the individual. POMS SI 01120.201D.1.a. For irrevocable trusts, if payments from the trust could be made to or for the benefit of the individual or the individual's spouse, the portion of the trust from which the payment could be made is a resource to the individual. POMS SI 01120.201D.2.a.

PRACTICE TIP: The practitioner needs to know the exceptions to the "countable trust" rule before preparing a trust for a disabled beneficiary.

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§6.43 (2) Limitation on Income

A disabled person with income above a set amount is ineligible for SSI. Income is a different concept for SSI purposes than for taxation purposes and is either "earned" (see 20 CFR §§416.1110-416.1112) or "unearned" (see 20 CFR §§416.1120-416.1124). Gifts, inheritances, and additions to trusts are considered unearned income. See 20 CFR §416.1121(g). Both earned and unearned income count against public benefits.

Not all income is counted, however. For example, the first $20 per month of general unearned income is not counted, nor is the first $60 per calendar quarter of "infrequent or irregular" unearned income. 20 CFR §416.1124(c)(6), (12). The first $65 of earned income is not counted as income nor is the first $30 per calendar quarter of "infrequent" and "irregular" earned income and one-half of remaining earned income. 20 CFR §§416.1112(c)(2), (4)-(5), (7). The receipt of countable unearned income over the limitation will result in a dollar-for-dollar reduction of SSI benefits. See 20 CFR §416.420.

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§6.44 (3) Reduction for In-Kind Support and Maintenance Provided

A special category of SSI income, "in-kind support and maintenance" (ISM) consists of food or shelter provided directly to the recipient or paid for by a third party. ISM reduces an SSI recipient's SSI benefits, but not dollar for dollar as with cash. Instead, the maximum reduction is subject to either the one-third reduction rule (also referred to as the "value of the one-third reduction" (VTR)) or the presumed maximum value (PMV) rule. 20 CFR §§416.1130-416.1148. PMV is defined as VTR plus the general income exclusion.

If the SSI recipient lives in the home of another and receives any ISM, SSI benefits will be reduced by one-third of the federal benefits rate ($674 for one person, $1011 for a couple in 2009 (ACWD Letter No. 08-51 (Nov. 18, 2008)); see http://www.ssa.gov/pubs/11069.html). 20 CFR §416.1131(a). In all other cases, if the SSI recipient receives any ISM, then under the PMV rule ISM is valued at the lesser of its actual value or at its "presumed" value of one-third of the federal benefit portion ($674 for a single person, $1011 for a couple in 2009), plus the $20 general income exclusion. 20 CFR §416.1140(a). Thus, whenever the beneficiary receives anything that constitutes food or shelter, the beneficiary's SSI will be reduced by either $244.67 (one-third of $674 plus $20) or the actual value of benefits received, whichever is smaller. For example, if the trustee directly pays the beneficiary's rent and the rent is more than $244.67 the beneficiary's SSI will be reduced by $244.67, even if the rent is $2000.

WARNING: When planning, the attorney must be careful that some ISM does not result in a total loss of SSI benefits, which in turn could result in loss of automatic Medi-Cal eligibility. Individuals with other sources of income whose monthly SSI payments are less than the VTR or PMV risk loss of SSI when they receive ISM.

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3. Medi-Cal

§6.45 a. Benefits

Medi-Cal (California's version of the Medicaid program) provides payment for hospitalization, doctors' services, prescription drugs, lab tests, home health care, nursing home care, and a host of related medical services (Welf & I C §14132); it is the only government program that pays for long-term nursing home care. The program also pays for some community mental health and drug abuse services and intermediate care facilities for the developmentally disabled. 22 Cal Code Regs §§51341, 51341.1, 51343. For descriptions of covered services, see 22 Cal Code Regs §§51301-51365. See also Welf & I C §14132.20 regarding development of a program to provide a person with developmental disabilities with continuous skilled nursing care if the services can be provided under a federal waiver program or pursuant to a Medi-Cal State Plan amendment.

As with SSI, retaining Medi-Cal eligibility and payments for a disabled beneficiary requires familiarity with the program. The following discussion is intended only as a brief introduction to the basic eligibility requirements.

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§6.46 b. Eligibility

Two main categories of persons are eligible for Medi-Cal benefits. First, subject to certain limited exceptions, an individual who receives SSI (or certain other public cash grant assistance) automatically qualifies for Medi-Cal as being "categorically needy." 42 CFR §435.4 and Welf & I C §14050.1 (definition); Welf & I C §14005.1 and 22 Cal Code Regs §50201 (eligibility).

Second, an individual whose income level is too high to meet SSI eligibility requirements may nevertheless be eligible for Medi-Cal if medical expenses will deplete the applicant's income to below a "maintenance need level." Such a person is "medically needy." 42 CFR §435.4, Welf & I C §§14051, 14051.5, and 22 Cal Code Regs §50203 (definition); Welf & I C §14005.7 and 22 Cal Code Regs §50201(a)(4) (eligibility).

The maintenance need level is a percentage of the cash grant payable to a person without income or resources. Computation rules are found in Welf & I C §14005.12 and 22 Cal Code Regs §§50601-50605. Income over the maintenance need level is applied to payment for medical services as the medically needy person's "share of cost," similar to a deductible on a health insurance policy. Welf & I C §14005.7; 22 Cal Code Regs §50090. For rules determining the share-of-cost amount, see 22 Cal Code Regs §§50651-50660.

Special property and income limits apply when determining whether an individual is medically needy. These rules are found in 22 Cal Code Regs §§50401-50489.9 (property inclusion and valuation; but see warning in Example in §6.57) and 50501-50571 (income determination). The resource limits for purposes of Medi-Cal eligibility are similar to the rules for SSI eligibility, although Medi-Cal regulations use the term "property," while SSI rules refer to "resources."

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§6.47 4. SSI and Medi-Cal Distinguished From Social Security and Medicare

Unlike SSI and Medi-Cal, Social Security and Medicare have no income or resource requirements. Medicare provides health care coverage to eligible disabled or elderly participants. It does not cover all health care needs of the disabled, nor does it cover all costs of the care received. Medicare does not cover any service that is not medically "reasonable and necessary." 42 USC §1395y(a)(1); 42 CFR §411.15(k). It specifically excludes coverage of, among other things, routine physical examinations, custodial care, and some preventive care. 42 USC §1395y; 42 CFR §411.15.

Social Security provides retirement and disability benefits. For Social Security purposes, a person is considered disabled if he or she is either (1) blind or (2) unable to engage in any substantial gainful activity due to a physical or mental impairment that is expected to last (or has lasted) 1 year or to result in death. 42 USC §423(d). In addition to benefits for a disabled worker, Social Security provides benefits for a disabled adult child of a covered worker. When a covered worker dies, becomes disabled before age 65, or retires, his or her disabled child is eligible for benefits if the child became disabled before age 22. 42 USC §402(d)(1); 20 CFR §404.350(a).

Many disabled persons and their families confuse Social Security disabled child benefits with SSI benefits because the cash payments are almost the same and both checks come from the Social Security Administration. If the only government benefits involved are Social Security and Medicare, an SNT may be unnecessary. On the other hand, an SNT may nevertheless be necessary to preserve the disabled child's future eligibility for Medi-Cal.

PRACTICE TIP: Often the disabled person or family is uncertain about the nature of the benefits received. The estate planner should ask the client to provide a copy of the monthly check (or bank statement if the benefit is received by direct deposit) and inquire with the local Social Security Office. This will require authorization from the payee.

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§6.48 D. Third Party Special Needs Trusts

A special needs trust (SNT) is usually the best method for leaving an inheritance to a disabled person. This type of SNT is often called a third party SNT because it is established with the assets of someone other than the disabled person. A properly established SNT will allow the disabled person to inherit without losing public benefits and will allow the settlor to set forth instructions for the care of the disabled beneficiary.

A well-drafted SNT establishes a management team to operate the SNT, sets up a system for the beneficiary's lifelong advocacy and care, plans for future modifications in public benefits and trust law, and directs distribution of remaining assets after the disabled beneficiary's death. Establishing an SNT is only half the battle; even a well-crafted SNT will not work if the people managing it do not understand all that is required of them. This is why selection of a management team is typically the most important decision to be made in preparing and establishing an SNT.

WARNING: If an SNT is funded with assets of a disabled person who is receiving needs-based public benefits, it is not a third party SNT. A first party SNT authorized by 42 USC §1396p(d)(4) will be needed. The expertise required to draft first party SNTs is even more specialized than for third party SNTs and they should never be attempted without the assistance of an attorney familiar with these issues.

For a full discussion of estate planning for persons with disabilities, see Special Needs Trusts: Planning, Drafting, and Administration (Cal CEB 2008).

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§6.49 1. Legal Authority

Third party SNTs that preserve Medi-Cal eligibility are authorized by 22 Cal Code Regs §50489.9. SNTs are not mentioned by name but are included under a catchall definition as "[t]rusts that are not described in Section 50489.1 or Section 50489.5." 22 Cal Code Regs §50489.9(a)(1).

If the beneficiary of a third party SNT cannot control the amount or frequency of trust distributions and cannot revoke the trust and use the funds for the beneficiary's personal benefit, the trust assets are not a countable resource to the beneficiary for SSI eligibility purposes. 42 USC §1382b(e)(3); 20 CFR §416.1201(a)(1); POMS SI 01120.200D.2.

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2. Introduction to Selected SNT Provisions

§6.50 a. Revocability

It is possible to have a revocable third party SNT. Attorneys experienced in this area commonly establish a stand-alone revocable SNT alongside the settlor's revocable trust. As long as the SNT is funded only with a promise to pay assets in the future, it will not disqualify the disabled beneficiary from needs-based public benefits. The revocable third party SNT will have triggering language stating that, once it receives assets, it will become irrevocable.

This type of planning gives the settlor the flexibility to make changes in the document if the law or his or her circumstances change. It also allows other family members and friends to leave the disabled person an inheritance that will be distributed to one SNT, rather than requiring each party to establish his or her own SNT for the disabled person.

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§6.51 b. Distribution Standard

A distribution standard specifies the amount of discretion the trustee has in making distributions of income and principal. The trustee of a third party SNT should be given sole and absolute discretion as to all distributions. A fully discretionary distribution standard will affect how well the trust works for the disabled beneficiary by avoiding an overly broad or overly narrow standard.

A distribution standard stating that a trustee *must* or *shall* distribute either income or principal at specified intervals or subject to an ascertainable standard (*e.g.,* for support or maintenance) is too broad. It may cause the trust to be considered an available resource for some needs-based public benefit programs, even if distributions are not actually made. The trustee may be compelled by a government agency to use trust funds to pay for the beneficiary's care, causing a loss of public benefits for the disabled person. See, *e.g., Frerks v Shalala* (2d Cir 1995) 52 F3d 412 (SSI and Medicaid properly terminated because trust funds could be released and used for support and maintenance). But see *White v Apfel* (7th Cir 1999) 167 F3d 369 (SSI benefits improperly terminated; mother of disabled child rebutted presumption that conservatorship funds were available for son's care with evidence that probate court refused request for release of funds).

A distribution standard stating that a trustee may only make distributions that will not cause any reduction in public benefits is too narrow. The trustee is precluded from using trust assets that may greatly benefit the disabled person while only slightly reducing public benefits. For example, if the trust were to pay $2000 a month in rent, the disabled person would lose only a fraction of that amount each month in SSI under the in-kind support and maintenance rules as of this writing. See §6.44.

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§6.52 c. Management Team

The selection of an SNT management team is crucial to the success of the trust. A key component of the well-drafted SNT is that it will last for the entire lifetime of the disabled beneficiary. This can mean decades of day-to-day SNT administration, which could present significant problems for an individual or nonprofessional trustee.

The most effective management team for a third party SNT is one that is familiar with all normal trustee duties, understands public benefits laws, is aware of the particular needs of the disabled beneficiary, knows the services and programs available to the beneficiary, effectively advocates for the beneficiary, can make changes to the SNT in response to changes in the law, and will outlive the disabled beneficiary. Because the duties of the trustee of an SNT are more demanding than those of a trustee who is expected only to manage and administer trust assets, it is often best to divide the duties among three separate entities:

- A trustee, responsible for financial investments and regular trustee duties;
- A trust advisory committee, responsible for overseeing the trustee and for the care and advocacy of the disabled beneficiary; and
- A trust protector, who will be able to make changes to the SNT in response to changes in the law.

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§6.53 (1) Trustee

A professional trustee, *i.e.*, a private professional or corporate fiduciary, is generally best suited to managing assets and most familiar with trustee duties. The professional trustee is familiar with normal trustee duties, including recordkeeping, accounting, investing under the prudent investor rules, and complying with other fiduciary duties to the beneficiary. The cost of a professional trustee is often offset by the trustee's experience in investing and the lack of future problems in administration of the SNT. A professional trustee, particularly a corporate trustee, is also more likely to be there to serve as trustee for the decades to come.

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§6.54 (2) Trust Advisory Committee

Family members and other persons interested in the disabled beneficiary may serve on the SNTs trust advisory committee (TAC). The TAC's responsibilities include monitoring the trustee, and the TAC has the right to remove and replace the trustee for any reason. This can provide an effective check and balance system if the SNT gives the trustee absolute discretion to make distributions.

If the trustee is unfamiliar with public benefit rules, the TAC may also include a professional member to supervise distributions that may affect the beneficiary's public benefits. The TAC may also be responsible for the future advocacy and care of the disabled beneficiary. Even though the disabled beneficiary may already have a network of caregivers (*e.g.,* social workers, medical personnel, physical or psychological therapists, in-home nurses), the TAC should continue to oversee the beneficiary's care. This includes:

- Determining which services are available;
- Ensuring that the beneficiary receives the highest level of care;
- Visiting the beneficiary to inspect living conditions;
- Consulting with doctors and caregivers;
- Ensuring that all available public benefits are requested and received by the beneficiary; and
- Applying for therapeutic, educational, and employment training programs for the beneficiary.

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§6.55 (3) Trust Protector

An individual—and in an unusual situation an entity (*e.g.,* a nonprofit)—should be named "trust protector" of the SNT. This will provide flexibility for the SNT to respond to changes in the law. The trust protector may be allowed to make changes to the SNT to conform future modifications to the law of public benefits or SNTs without court intervention. The trust protector may also serve as a backup to the TAC in removing and replacing a trustee and appointing successor TAC members in the event of death or resignation.

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§6.56 VIII. MEDI-CAL PLANNING

Medi-Cal, California's version of Medicaid, provides health insurance, including long-term nursing home care, for needy individuals. Because of the high cost of long-term nursing home care, Medi-Cal may become relevant for many clients not traditionally considered needy. If a client or his or her spouse needs or is likely to need Medi-Cal coverage, especially for long-term nursing home care, his or her estate planning attorney must be knowledgeable about Medi-Cal eligibility rules and the potential of a California Department of Health Care Services (DHCS) estate claim after the client's death.

For an in-depth discussion of Medi-Cal, see California Elder Law Resources, Benefits, and Planning: An Advocate's Guide, chaps 9-12 (Cal CEB 2003).

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A. Specialized Area of Practice

§6.57 1. Applicable Law Difficult to Locate

Medi-Cal planning is a highly specialized area of practice for several reasons. To begin with, the law governing this area is hard to find in one place. This is partly because Medi-Cal is both a federal and state program and is governed by both federal and state sources. On the federal level, Medi-Cal is governed by the federal Medicaid statutes (42 USC §§1396-1397f) and regulations (42 CFR §§430.0-456.725), and agency guidelines such as the (federal) State Medicaid Manual and transmittals by the Centers for Medicare & Medicaid Services (CMS). SSI rules indirectly affect Medi-Cal eligibility determinations because federal law provides that Medi-Cal asset and income rules may be no more restrictive than those for the SSI program. See 42 USC §§1396a(r)(2)(A)-(B), 1396a(a)(10)(C)(i)(III); 20 CFR §416.1212. On the state level, Medi-Cal is governed by Welf & I C §§14000-14029.5, 22 Cal Code Regs §§50000-50966, and DHCS guidelines.

The applicable Medi-Cal law is also hard to find because California has not fully implemented federal Medicaid law. As a result, in many instances the state regulations are outdated and misleading. When the state regulation is outdated, attorneys must seek direction from All County Welfare Directors (ACWD) Letters, which DHCS publishes from time to time to announce a change in policy. ACWD Letters are available as far back as 1978 at http://dhs.ca.gov/mcs/mcpd/MEB/ACLs.

EXAMPLE: California never issued regulations to implement the Omnibus Budget Reconciliation Act of 1993 (OBRA 1993) (Pub L 103-66, 107 Stat 312) transfer rules. As a result, the earlier Medicare Catastrophic Coverage Act of 1988 (MCCA) (Pub L 100-360, 102 Stat 683) rules remain in effect. Thus, practitioners must be careful not to rely on either the obsolete official published transfer regulations (22 Cal Code Regs §§50406-50410) or the apparently mandatory OBRA 1993 or Deficit Reduction Act of 2005 (DRA) (Pub L 109-171, 120 Stat 4) transfer rules that have replaced the MCCA rules. Instead, until DHCS issues OBRA 1993 and DRA transfer regulations, practitioners must refer to and rely on the draft MCCA transfer regulations issued in 1990, which exist only as an attachment to an ACWD Letter. 22 Cal Code Regs §§50408.5-50411.5 (Draft), attached to ACWD Letter No. 90-01 (Jan. 5, 1990).

For further discussion of federal and state legal authority governing Medi-Cal, see Elder Law Resources §§9.3-9.4.

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§6.58 2. Lack of Coherent Guidelines

In addition to the basic problem of locating the applicable law, in recent years DHCS has enacted regulations to implement federal law in a piecemeal fashion, resulting in some inconsistencies and lack of coherent guidelines.

EXAMPLE: California has implemented OBRA 1993 unevenly. The state has implemented the federal revisions to estate recovery (see §6.70) and has issued regulations to implement the OBRA 1993 *trust* rules (see §6.69). However, as noted in the Example above, DHCS has not issued any regulations or instructions to implement the OBRA 1993 or more recent DRA (2005) *transfer* rules.

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§6.59 3. Law Constantly in Flux

In addition to highly technical statutory requirements and specialized strategies, the complex law in this area is constantly changing. For example, the federal and state governments are often changing the eligibility and estate claim rules as they seek to contain Medi-Cal/Medicaid costs.

EXAMPLE: The Deficit Reduction Act of 2005 (DRA) (Pub L 109-171, 120 Stat 4) affects eligibility in many ways: DRA adds a dollar cap to the equity value of a home that may be exempt (see §6.66), increases the look-back period to 60 months for all gift transfers, and starts the penalty period of ineligibility from the date of the application for long-term care benefits (or the asset transfer, whichever is later). The Act became effective on February 8, 2006. The California Welfare and Institutions Code has now been amended to conform to DRA requirements. However, the amendments will not take effect until regulations are promulgated on a non-emergency basis by DHCS, and the new rules will only apply prospectively. See Stats 2008, ch 379. As of this writing, California is in the process of implementing comprehensive DRA regulations that must go through the regulatory approval process. Regulatory changes are expected in 2010, at the earliest. However, note that DHCS has already implemented the proof-of-citizenship provisions with the release of ACWD Letter No. 07-12 (June 4, 2007). For up-to-date and reliable news about changing Medi-Cal rules, see the website of California Advocates for Nursing Home Reform (CANHR) at http://www.canhr.org.

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§6.60 4. Warning

It is difficult for an attorney who does not regularly practice in this area to quickly attain a level of competence and to be aware of the common pitfalls. Estate planning counsel not familiar with Medi-Cal planning issues should seek help from an experienced attorney, or factor in many hours of study to become competent in this important and complex area. Estate planners who are not knowledgeable about Medi-Cal planning when it is relevant for a client may produce an estate plan that is at odds with and interferes with effective Medi-Cal planning.

For complete coverage of Medi-Cal and Medi-Cal planning, see Elder Law Resources, chaps 9-12.

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§6.61 B. Difficulty of Coordinating Estate Planning and Medi-Cal Planning

Coordinating estate and Medi-Cal planning can be complicated because the goals of each type of planning are somewhat different. Estate planning usually involves reviewing a client's assets and income and creating a plan that makes the client's assets and income available for the client's lifetime support and available or transferable to designated persons or entities after the client's death. By contrast, Medi-Cal planning involves reviewing a client's assets and income to determine whether they meet asset and income guidelines for Medi-Cal eligibility. If income and asset guidelines are not met, Medi-Cal planning involves evaluating whether assets may be reduced by investing in exempt assets or making transfers during the client's lifetime. For assets that the client is able to retain without compromising Medi-Cal eligibility, the attorney must evaluate and advise the client whether such assets will be subject to an estate claim for reimbursement by the Department of Health Care Services after the client's death.

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§6.62 C. Medi-Cal Planning Issues

The following sections discuss some important Medi-Cal planning issues that the estate planner must consider. The issues addressed, however, do not represent an exhaustive treatment of the subject.

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§6.63 1. Drafting for Possible Incapacity of the Client

To allow for Medi-Cal planning in case of the client's incapacity, the client may want to consider giving the agent (attorney-in-fact) or trustee, or both, flexibility in planning for Medi-Cal eligibility, specifying in the document(s) whether and to what extent the agent or trustee can make transfers and gifts. Authority to make gifts and transfers must be allowed by court order or be specifically authorized in the power of attorney. Prob C §4264(c). See, *e.g.*, Prob C §§3100-3154 (proceeding for particular community property transaction when one spouse lacks capacity); Prob C §17200 (petition concerning internal affairs of trusts). In the absence of authority to withdraw assets from the trust, a trustee taking such action may be liable for breach of trust. See generally Prob C §§16000, 16006. For an unmarried applicant without a power of attorney or a trust, it may be necessary to appoint a conservator so that the applicant can petition to allow Medi-Cal planning under the substituted judgment provisions of Prob C §§2580-2586.

WARNING: Judges' opinions about Medi-Cal planning vary; in jurisdictions in which the reviewing judge is opposed to lifetime transfers of assets for Medi-Cal planning, a court order will not be an available option and the client seeking benefits may, in the absence of another Medi-Cal planning strategy, have to spend down his or her nonexempt assets before becoming eligible for Medi-Cal.

Another issue to consider when drafting estate planning documents is whether to give the agent or successor trustee, or both, authority to amend or revoke the client's estate plan. This is especially important for married persons because often a first step in estate planning to qualify for Medi-Cal is to revoke a couple's trust. This is followed by transferring income and assets to the well spouse and preventing the incapacitated, ill spouse from inheriting the couple's assets should the well spouse die first.

For further discussion of providing for Medi-Cal planning after the client becomes incapacitated, see California Powers of Attorney and Health Care Directives §§5.21-5.23 (Cal CEB 2008) and discussion in Elder Law Resources beginning at §11.51.

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§6.64 2. Meeting Income and Asset Eligibility Guidelines

For clients applying for Medi-Cal, the attorney must determine whether the client meets the income and asset guidelines for Medi-Cal eligibility. 22 Cal Code Regs §§50401-50489.9 (property inclusion and valuation; but see warning in Example in §6.57), §§50501-50571 (income) §§50408.5-50411.5 (Draft), attached to ACWD Letter No. 90-01 (Jan. 5, 1990). Planners must know which assets the client is permitted to keep and still qualify for Medi-Cal (*i.e.,* exempt assets under 42 USC §1382b(a)) and must be familiar with the valuation rules that apply to exempt and nonexempt assets.

For instance, an individual may not have more than $2000 in cash or liquid "countable" assets. 22 Cal Code Regs §§50419-50420. Exempt assets that are not counted for a Medi-Cal applicant's eligibility include the personal residence (Welf & I C §14006(b) (but see §6.66 regarding new DRA equity limits); 22 Cal Code Regs §50425), one motor vehicle (22 Cal Code Regs §50461(a); ACWD Letter No. 96-55 (Sept. 20, 1996)), and a burial plot or burial contract (Welf & I C §11158; 22 Cal Code Regs §§50477, 50479; ACWD Letter No. 93-71 (Oct. 4, 1993)). See discussions in Elder Law Resources at §9.13 (eligibility in general) and beginning at §§9.14 (asset rules) and 9.39 (income rules).

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§6.65 a. Spending Down and Lifetime Transfers to Gain Eligibility

If a client has nonexempt assets in excess of the eligibility guidelines, the client may "spend down" by investing in exempt assets or paying off debt and paying privately for his or her own care until he or she becomes eligible. Another common Medi-Cal planning strategy is to make lifetime transfers, carefully taking into account applicable federal and state law and regulations that seek to discourage such transfers. 42 USC §1396p(c)-(d); 22 Cal Code Regs §§50408.5-50411.5 (Draft), attached to ACWD Letter No. 90-01 (Jan. 5, 1990).

If transfers are made in violation of applicable law, the client will be disqualified for Medi-Cal benefits for the period required until the lapsed benefits equal the value of the transferred asset. 42 USC §1396p(c)(1)(B)(i). Consequently, the attorney must be familiar with transfer rules, which include exceptions, and the transfer penalty and how it is calculated. See, *e.g.*, 22 Cal Code Regs §§50408.5-50411.5 (Draft), attached to ACWD Letter No. 90-01 (Jan. 5, 1990) (transfer rules); Welf & I C §14015(b) (exception for transfers exclusively for purpose other than to qualify for medical assistance); 42 USC §1396p(c)(1)(B)(i) (transfer penalty period); 42 USC §1396p(c)(1)(D)(ii), (E)(iv) (calculation). In addition, in considering lifetime gifts, the attorney must also be aware of and advise the client about the consequences—tax and otherwise—to the donor and donee. See discussions in Elder Law Resources at §9.16 and beginning at §9.46.

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§6.66 b. The Residence

Estate planners should also be aware of the rules that apply to the client's residence as an exempt asset and to the lifetime transfer of the home. For many years, a Medi-Cal beneficiary's home of any value has been considered an exempt asset. However, the Deficit Reduction Act of 2005 (DRA) imposes a home equity limit of $500,000, with a state option to increase the limit to $750,000. 42 USC §1396p(f). California has opted for a home equity limit of $750,000; however, because implementing regulations have not yet been enacted, as of this writing, the exempt home can still be of any value. See Elder Law Resources §9.17.

Once California regulations implement the DRA home equity limit, long-term care planning will likely include strategies to reduce home equity when a client's home is over the limit. In order to reduce equity in the home, if the owner qualifies, he or she might take out a home equity loan and apply the proceeds to home repairs or long-deferred maintenance or to the purchase of an exempt asset, such as a new automobile. Any home equity in excess of the limit is to be considered an available resource unless the Medi-Cal beneficiary's spouse or minor, blind, or disabled child resides there. 42 USC §1396p(f)(2).

WARNING: Because California has not yet adopted regulations implementing the $750,000 maximum limit on the value of the exempt home, counsel is urged to monitor California's regulatory implementation of DRA. In addition, although federal law imposes an ineligibility penalty for the transfer of the client's home, California law currently does not follow federal law (see ACWD Letter No. 90-01, Q&A Nos. 7-8 (Jan. 5, 1990)); however, the state has indicated that this rule may change.

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§6.67 3. Eligibility Rules When One Spouse Needs Long-Term Nursing Home Care

Special Medi-Cal eligibility rules apply for couples when one spouse needs long-term nursing home care. If one spouse (the ill spouse) needs Medi-Cal for long-term nursing home care, the other spouse (the well spouse or "community spouse" in Medicaid terminology) is allowed to keep a certain amount of the couple's joint and separate income and assets. See 42 USC §1396r-5, especially §1396r-5(d) (minimum monthly maintenance needs allowance), §1396r-5(f) (community spouse resource allowance); Welf & I C §14005.12; ACWD Letter No. 90-01 (Jan. 5, 1990); ACWD Letter No. 90-03 (Jan. 8, 1990). For current eligibility amounts, see the CANHR website at http://www.canhr.org. The assets that the well spouse may retain must be transferred to him or her and out of the name of the ill spouse. 42 USC §1396r-5(f)(1); 22 Cal Code Regs §50490.7(d) (Draft), attached to ACWD Letter No. 90-01 (Jan. 5, 1990).

If the ill spouse needing long-term care is incapacitated, the well spouse must have the authority to make these transfers or he or she will be required to obtain a court order under Prob C §§3100-3154. See §6.63.

For details of rules, see discussions in Elder Law Resources beginning at §§10.71 (in general), 10.74 (minimum monthly maintenance needs allowance), and 10.82 (community spouse resource allowance).

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§6.68 4. Rules Regarding Annuities

Counsel must be aware of specific rules regarding annuities that affect a client's Medi-Cal eligibility. Annuities must meet certain standards to be considered exempt assets. For instance, they must be actuarially sound in that the term of an annuity should not exceed the client's life expectancy according to actuarial tables used by DHCS. 42 USC §1396p(c)(1)(G); 22 Cal Code Regs §50489(b). Furthermore, income from an annuity is counted as part of the client's income and must be used to pay a share of the cost of nursing home care. 22 Cal Code Regs §50489.5(g)(1); on share of cost, see 22 Cal Code Regs §§50605, 50653, 50659. Finally, annuities purchased on or after September 1, 2004, are not insulated from recovery by the state on the death of the Medi-Cal beneficiary. 22 Cal Code Regs §§50960.12, 50961(h). In fact, for annuities purchased after the enactment of the Deficit Reduction Act of 2005 (DRA), federal law requires that the state be named as a remainder beneficiary of the annuity for at least the total amount of the Medi-Cal benefits paid on behalf of the institutionalized individual. 42 USC §1396p(c)(1)(F)(i). See discussion of annuities in Elder Law Resources beginning at §11.32.

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§6.69 5. Rules Regarding Trusts

To discourage people from transferring their assets to a trust in order to qualify for Medicaid, Congress enacted a 60-month look-back rule for assets transferred to trusts. 42 USC §1396p(c)(1)(B)(i). (As noted in §6.59, under the DRA, a 60-month look-back period will apply to any disqualifying transfer.) This means that, depending on the value of the assets, an individual may not be eligible for Medi-Cal for 5 years after transferring assets to a trust.

The fact that assets are in a trust does not insulate them from scrutiny for Medi-Cal eligibility purposes. Under Medi-Cal rules, assets in a trust in which the settlor serves as trustee, or can direct the trustee to make distributions, are considered available to the settlor and will disqualify the settlor from Medi-Cal eligibility if they exceed the allowable resources. 42 USC §1396p(c); 22 Cal Code Regs §50489(d). In addition, trust income that is required to be distributed to a beneficiary or that is available on the beneficiary's request is considered available income for Medi-Cal eligibility purposes and may preclude eligibility or be included in a client's share of cost. 22 Cal Code Regs §50489.5(d)-(f).

Because of the rules about trusts, Medi-Cal planners often use specialized trusts as part of the client's overall estate and Medi-Cal planning. For instance, if a client has a disabled spouse or child, the estate planner must be aware of and able to advise the client regarding the use of special needs trusts. Special needs trusts allow assets to be used for specific, nonmedical purposes for the benefit of a disabled person who is under age 65, as long as the beneficiary cannot control distributions from the trust. 42 USC §1396p(d)(4)(A); 22 Cal Code Regs §50489.9. With a properly drafted special needs trust, the trust beneficiary may maintain Medi-Cal eligibility even though trust assets may be used for his or her benefit. On special needs trusts, see §§6.48-6.55. Another example of specialized trust practice in Medi-Cal planning is the use of an occupancy trust to protect the client's residence against a DHCS estate claim after the client's death. See 22 Cal Code Regs §50961(i)-(j).

For further discussion of Medi-Cal eligibility restrictions on trusts and trust assets, see Elder Law Resources beginning at §9.48.

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§6.70 6. Medi-Cal Estate Claims

The Department of Health Care Services engages in recovery against estates of Medi-Cal beneficiaries for benefits paid on behalf of individuals eligible for Medi-Cal. 42 USC §1396p(b)(1)(A)-(B), (4)(A); 22 Cal Code Regs §§50960.12, 50961(a). The deceased Medi-Cal beneficiary's remaining assets, *i.e.,* real and personal property, including his or her residence and annuities, may be subject to an estate claim regardless of whether the property is in the deceased's probate estate. 22 Cal Code Regs §50960.12. For instance, joint tenancies in which the deceased beneficiary was a joint tenant may be subject to recovery to the extent of the deceased beneficiary's interest. 22 Cal Code Regs §50960.12(a). Recovery is barred until the death of the Medi-Cal beneficiary's surviving spouse or until the death of the beneficiary's surviving minor, blind, or disabled child, if there is any. 22 Cal Code Regs §50961(d). Federal law provides for a waiver of the state's recovery based on substantial hardship; state law also provides for a waiver based on substantial hardship. 42 USC §1396p(b)(3); 22 Cal Code Regs §50963. For extensive discussion of estate recovery claims, see Elder Law Resources, chap 12.

PRACTICE TIP: The attorney is often called on to advise a client regarding the estate recovery process and to engage in planning strategies to reduce or avoid estate claims. As state and federal governments seek to address health care spending deficits, they are actively seeking estate recovery and enacting changes in the law and regulations to facilitate collection.

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7

Planning Devices and Issues: An Overview

Nancy D. Rasch

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§7.1 I. INTRODUCTION

The aim of estate planning is to formulate and implement plans for transferring a client's property, providing for the care and custody of minor children, and preparing for possible incapacity. An estate plan typically includes a number of different planning devices that together form a complete plan to achieve the client's objectives. A comprehensive estate plan will provide the management tools needed to address both health and financial concerns, and will avoid the necessity of a conservatorship or other court-supervised action in the event of incapacity.

The primary tools for a comprehensive plan are wills, revocable trusts (irrevocable trusts are beyond the scope of this book), durable powers of attorney for financial management, pay-on-death accounts, beneficiary designations, joint tenancies, advance health care directives, and related documents. Additional documents may be required when planning for minor beneficiaries.

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II. MANAGING AND DISTRIBUTING ASSETS

§7.2 A. Wills

A will is probably the most common and most readily understood estate planning device. It takes effect only on the testator's death and allows the testator to dictate how the estate will be distributed after his or her death. A will governs the disposition of assets held solely in the client's name that are not governed by beneficiary designation. It also governs beneficiary-designated assets if the estate is named as the beneficiary or if no designation has been made and the asset holder's default provisions direct distribution to the estate. In addition, the will controls the disposition of the client's interest in assets held as a tenant in common or interest in community property assets not held in the client's revocable trust.

For complete coverage of how to draft wills, see California Will Drafting (3d ed Cal CEB 1992).

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§7.3 1. Advantages

A will is less complicated and less expensive to establish than a revocable trust and, once executed, it does not require the transfer of assets to be effective. It is easy to amend when the testator's circumstances change, either by revoking and replacing the entire will, or by executing a codicil to the will.

Not all wills require probate. Small estates of less than $100,000 that meet certain other requirements set forth in Prob C §§13000-13210 may be eligible for summary administration, an informal procedure for transfer of assets to the beneficiaries under the will or the laws of intestate succession. See Prob C §§13100, 13151.

The simplicity of a will may make it the most suitable alternative for clients who are not concerned with estate taxes or providing for spousal transfers. For example, an unmarried person who owns real property and does not care about probate costs may choose to continue holding title solely in his or her name and to have it pass under a will, thus avoiding the cost and effort of establishing a trust. When presented with the probate costs, however, many unmarried clients will decide to create a revocable trust and transfer title to their real property to it. This might be recommended, in particular, for an unmarried person with minor children. See discussion in chap 10.

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§7.4 2. Disadvantages

For most clients, the primary disadvantage of a will is that it may require formal probate administration. Unlike a trust, which does not have to be lodged with the court on the death of the settlor, a will filed with the court, as required by Prob C §8200, or offered for probate becomes a matter of public record. Not only are the terms of a probated will public, but so is the inventory and appraisal of estate assets. Probate administration requires court supervision, although some actions may be taken without prior court approval, and administration may delay distribution of the assets to the beneficiaries. The fees to the administrator and the attorney, which are set by statute, may be a costly expense.

In addition, although courts will generally strive to uphold a will in order to avoid intestacy, a will that fails to meet statutory requirements as to form and execution may be denied admission to probate. In such a case, the estate will pass by the laws of intestacy and the testator's contrary wishes will not be given effect.

The client should be advised to be sure to review the will periodically to address changed circumstances such as the birth of a child, separation from one's spouse, or dissolution of a marriage, in order to avoid unintended consequences. For example, the status of a separation or dissolution at death may determine whether or not a person is deemed a "surviving spouse" with all the rights of that designation.

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§7.5 B. Trusts

A trust is an arrangement in which the time for enjoyment of property is divided. This is most commonly done by giving one person use of the property for a period of time, such as for life, and designating another person (the remainder beneficiary) to receive the property at the end of that period. The person setting up the trust is referred to either as the "settlor," "trustor," or "grantor." The person administering and distributing the trust property is the trustee. If the settlor has the ability to change the trust provisions, it is a *revocable* trust; if there is no power to amend the trust and the settlor permanently relinquishes most rights to control the property, it is *irrevocable*. Most often a trust is made irrevocable primarily for tax reasons and to insulate the assets from the reach of creditors.

If the trust is operative during the settlor's life, it is an inter vivos trust; if it takes effect and comes into being only on death through the settlor's will, it is a testamentary trust. An inter vivos revocable trust is sometimes referred to as a living trust.

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§7.6 1. Revocable Trusts

An inter vivos revocable trust serves both as a testamentary instrument to transfer property at death and as a management tool during the settlor's life. In most instances, the settlor is the primary beneficiary of the trust and serves as the initial trustee. The trust document will also provide for appointment of a successor trustee or trustees who can assume responsibility if the initial trustee resigns, dies, or becomes incapacitated. Because the trust document provides for succession of authority by its own terms, court intervention generally is not required.

For complete coverage of drafting trusts, see Drafting California Revocable Trusts (4th ed Cal CEB 2003).

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§7.7 a. Advantages

The major advantages of a revocable trust are that it:

- Provides for management of the estate during the settlor's lifetime;
- Provides for management during periods of incapacity;
- May offer opportunities for tax planning; and
- May avoid probate of the estate on death of the settlor.

PRACTICE TIP: One of the most common client misperceptions is that assets held in trust are not subject to estate taxes. Although a trust may offer opportunities for tax *planning*, a trust does not prevent the imposition of an estate tax when the size of the estate otherwise requires it.

A trust also offers more flexibility than a standard will because assets may continue to be held in trust for one or more beneficiaries. This may be important for a variety of reasons, such as a settlor's desire to stagger distribution of assets to beneficiaries over a period of years, or to designate one beneficiary to receive only income and another to receive the residue. It may also be useful when the beneficiaries include minor children or an adult with special needs; the trustee's ability to continue managing the property in those circumstances may eliminate the need to establish a guardianship or conservatorship or prevent the loss of public benefits. Finally, if property located outside the settlor's state of residence is held in a revocable trust, there will be no need for multiple probate proceedings at death.

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§7.8 b. Disadvantages

One of the primary advantages of a revocable trust—that it requires no court supervision—can also be one of its greatest disadvantages. The lack of court oversight makes it relatively easy for a trustee to abuse his or her powers by self-dealing or converting trust assets to his or her own use or benefit. Even the most well-intentioned trustee may inadvertently create a legal mess by acting, or failing to act, without proper legal advice. It is imperative that a trustee clearly understand his or her fiduciary duties, among them the duty to avoid commingling trust and personal assets, to keep detailed records, and to act in the interests not only of the life beneficiary but of the remainder beneficiaries as well. A conscientious fiduciary with proper professional advice is the key to a well-functioning trust.

Other potential problems may limit the effectiveness of the trust. A poorly drafted trust may require court intervention to interpret the settlor's intentions, undo provisions that may be disadvantageous from a tax standpoint, or make other modifications if problems are discovered when the settlor no longer has the legal capacity to amend the trust. Another frequent problem arises if the trust is prepared and executed but not funded because the settlor either has not received proper advice or fails to understand that assets must be re-titled in the name of the trust. An empty trust provides none of the benefits contemplated, and may even result in an otherwise unnecessary probate proceeding.

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§7.9 2. Marital Trusts: The Marital Deduction

As discussed in chap 3, the unlimited marital deduction is one of the most important deductions from the gross estate allowed in determining a decedent's taxable estate. This deduction is allowed for property that passes or has passed from the decedent to the surviving spouse and is part of the decedent's gross estate. IRC §2056(a). It gives married couples the opportunity to defer tax liability on the decedent's estate until the death of the surviving spouse. The statutory requirements for qualifying a transfer for the marital deduction are designed to ensure that the transferred property will be treated as owned by the surviving spouse for purposes of future imposition of estate and gift taxes when the property is later transferred by the surviving spouse.

An unconditional, outright transfer of property to a surviving spouse qualifies for the marital deduction, and is subject only to the relatively few requirements listed below. Transfers to trusts, however, are restricted to ensure that the assets will be included in the survivor's estate for tax purposes, even though the survivor is not the actual owner of the trust property. To qualify for the marital deduction, the transfer, whether outright or in trust, must meet the following requirements (IRC §2056(a)-(b), (d)):

- The interest must pass to the surviving spouse.
- The surviving spouse must be a citizen of the United States.
- The interest must be includable in the decedent's gross estate.
- The interest must not violate the terminable interest rule (*i.e.,* it must not constitute a nondeductible terminable interest, which is one that will terminate by the passage of time or the occurrence or nonoccurrence of an event, upon which possession or enjoyment of the property passes to another).

Internal Revenue Code §2056(b)(7) provides a statutory exception to the terminable interest rule for a qualified terminable interest property (QTIP) trust and the legal life estate equivalent. Under that exception, the surviving spouse must be given a life income interest, and the deceased spouse's executor must make an election causing the trust corpus to be included in the survivor's estate under IRC §2044.

For further discussion of the martial deduction, marital deduction trusts, and marital deduction planning, see chap 3; Drafting California Revocable Trusts, chap 9 (4th ed Cal CEB 2003).

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C. Power of Attorney for Financial Management

§7.10 1. Description

A power of attorney for financial management is a document in which a person (the "principal") designates an agent (the "attorney-in-fact") to act in his or her stead in one or more matters. A power of attorney may be "limited," *i.e.,* for a specific act or transaction such as purchasing real property, or "general," meaning that a broad grant of power has been conferred. If the power is a "durable" power of attorney, it continues in force and effect during periods when the principal is incapacitated. A power that is not durable ceases to be effective during the principal's incapacity, which significantly reduces its usefulness as a planning device.

A general durable power of attorney, unless restricted by its own terms, confers on the agent the authority to act in any way that the principal could act, including but not limited to real and personal property transactions, sale or refinance of real property, financial and banking transactions, insurance, benefits, litigation, and estate matters. An agent may be given authority to act on the principal's behalf regarding a broad variety of issues, including tax matters, litigation, private or public benefits, and personal care decisions. The power of attorney may take effect immediately on execution, or it may be a "springing" power of attorney that becomes effective only on the occurrence of a particular event, most typically the incapacity of the principal. The general durable power of attorney remains in effect until it is revoked or amended.

A general durable power of attorney is a key component in a comprehensive estate plan, even when there is a revocable trust, because the agent may carry out certain actions when the trustee has no authority. For example, a trustee has control only over that property specifically transferred to and titled in the name of the trust, whereas the agent can assert authority over any nontrust asset, whether owned at the time the power of attorney is executed or acquired later. If authority is granted both in the trust document and in the power of attorney, an agent can create, modify, amend, or fund a revocable trust.

Statutory form powers of attorney are readily available in stationary stores or online and may be executed by the principal without the services of a lawyer. When the agent is a trusted friend, relative, or professional, it allows the principal's finances to be managed efficiently and without the expense of a court proceeding.

For complete coverage of durable powers of attorney, see California Powers of Attorney and Health Care Directives (Cal CEB 2008).

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§7.11 2. Planning Issues

Unfortunately, the very characteristics that make a power of attorney useful create the greatest risk for abuse. Power of attorney forms may be executed by persons whose capacity to do so is suspect, and it is not uncommon for an elderly person who may be experiencing diminished capacity or is otherwise susceptible to undue influence to grant a power of attorney to a recent acquaintance or new "best friend."

Most importantly, there is no supervision by a court or other party to ensure that the agent is acting in the best interests of the principal. Although there is a procedure for court review (Prob C §4540), that review will occur only if someone has cause to suspect the agent's actions, and that may come too late if money or property has already been misappropriated.

Even when the agent is trustworthy, other factors may limit the usefulness of the power of attorney. Third parties may refuse to honor the power of attorney, despite statutory protection from liability for relying on an apparently valid power of attorney. In addition, appointment of an agent does not prevent the principal from continuing to act concurrently with the agent. The principal may still enter into contracts, dispose of assets, or take other actions, even if his or her capacity to do so is questionable, and these actions may thwart the agent's ability to manage and protect the estate, especially when the agent is concerned about the principal's susceptibility to undue influence.

Attorneys advising clients regarding powers of attorney should satisfy themselves that the principal understands the broad powers being granted. Attorneys may also wish to discuss inclusion of additional protections in the power of attorney such as periodic review of the agent's actions or a requirement to provide accountings not only to the principal but to a trusted family member, friend, or accountant as well.

PRACTICE TIP: In elder financial abuse cases, abuse of durable powers of attorney by the agent is not uncommon. In a typical scenario, an elderly client may remember signing documents but does not have copies of those documents and is unclear as to the nature of those documents. If the client owns real property, the attorney should consider recording a revocation of "any power of attorney that may have been granted in favor of (name)." Recordation of the revocation will give notice to third parties and will prevent the agent from transferring or encumbering the real property.

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§7.11A D. Nomination of Conservator of the Estate

In a conservatorship of the estate, a court-appointed conservator manages the financial affairs of a person who is substantially unable to manage his or her own financial resources or to resist fraud or undue influence. See Prob C §1801(b). The conservator's primary responsibility is to conserve, manage, and use the conservatee's property in California for the benefit of both the conservatee and those whom he or she is obligated to support.

Selection of the conservator is always in the sole discretion of the court, which must be guided by what is in the best interests of the conservatee. Prob C §1812. That said, when the court appoints a conservator, it must give priority to the person nominated by the proposed conservatee, provided the nomination was made at a time when the proposed conservatee had the capacity to form an intelligent preference, unless the court finds that appointment of that nominee is not in the proposed conservatee's best interests. Prob C §1810. The only formal requirements are that the nomination be in writing and signed. Prob C §1810. The nomination of a conservator of the estate may be included in a power of attorney for financial management, in a written advance health care directive, or in a separate writing. Prob C §1810.

In creating an estate plan, an important reason for including a power of attorney for financial management is to avoid the necessity of a court-appointed conservator of the estate. However, there may be circumstances in which only a conservator of the estate can take certain actions with respect to the client's estate. Therefore, an advance nomination of the person who the client would wish to serve as conservator is a planning precaution that is recommended. The same person may be appointed the agent and nominated as the conservator of the estate.

NOTE: A durable power of attorney for financial management executed by a conservatee before a conservator is appointed is not nullified by operation of law, but the conservator of the estate may petition the court in which the conservatorship is pending to revoke or modify a durable power of attorney. Prob C §4206(b).

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E. Accounts Transferred on Death

§7.12 1. Types of Accounts

A "pay on death" (POD) account allows the account holder to name one or more persons or entities (*e.g.,* the client's revocable trust) to receive the funds that remain in the account on the death of the account holder. Prob C §5140. A designated payee has no right of access to the funds during the life of the account holder. Prob C §5301(b). If the account holder designates two or more payees, the funds will be divided in equal shares among the surviving payees unless the account or deposit agreement provides for a different distribution. Prob C §5302(b)(2). The account holder has complete control over the funds during his or her lifetime, including the right to change the named beneficiary, revoke the account, and use or withdraw assets of the account. Prob C §5303(b)-(c).

A "Totten trust" is essentially the same as a POD account, except that the account holder is said to hold the account in trust for the beneficiary. See Prob C §80. As with a POD account, the named beneficiary is not entitled to the funds in the account until the death of the account holder. Prob C §5301(c). Unless the account is specifically made irrevocable, the account holder has complete control over the funds during his or her lifetime, including the right to change the named beneficiary, revoke the account and use or withdraw assets of the account. Prob C §§5301(c), 5303(b)-(c).

A mechanism similar to a POD bank account exists to transfer registered securities and brokerage accounts on the owner's death. Prob C §§5503-5505. As with POD and Totten trust accounts, designation of a beneficiary has no effect on ownership of the security or brokerage account during the life of the owner. The owner of the security or brokerage account retains full rights to the asset during his or her lifetime, and may cancel or change the beneficiary designation at any time. Prob C §5506.

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§7.13 2. Planning Issues

All three types of accounts described in §7.12 have advantages, particularly for small estates or estates consisting primarily of cash or securities when there is no need for tax planning. First, the designation is simple to make, requiring only completion of appropriate forms provided by the financial institution. Second, there are no restrictions on use of the account by the account holder, who retains the right to withdraw all of the money or securities in the account during his or her lifetime. Prob C §§5303(b)-(c), 5506. If there are multiple account holders, the payee does not receive the funds in the account until all of the account holders have died. Prob C §§5302(a)-(b), 5507. Third, the account holder can easily change the designated payee if he or she so chooses, or cancel the beneficiary designation altogether, without notice to the existing named payee. Prob C §§5303(b)-(c), 5506. Finally, because the payee's interest vests immediately on the death of the account holder, the asset is not subject to probate administration. Prob C §§5302(a)-(b), 5403-5404.

For POD accounts, there are a few potential disadvantages to consider. Most importantly, the client must understand that beneficiary designations cannot be changed by will. Prob C §5302(e). Any change of payee must be done by revoking or amending the deposit agreement at the financial institution where the account is established. Prob C §5303. The client should be strongly advised that it is important to review beneficiary designations from time to time to take into account changed circumstances and to make sure that the beneficiary designations are all consistent with the client's overall estate plan.

If there are substantial funds in any of these accounts and the client has created a revocable trust, it may be best to name the trustee as the beneficiary. This will ensure that the estate plan is a coordinated one and that all of the major assets are governed in a way consistent with the client's objectives and priorities.

A surviving spouse who is not the designated beneficiary of a deceased spouse's account may have rights against the named beneficiary of any of these accounts if the account includes community property funds and was established without the surviving spouse's written consent. Prob C §5020. A court may set aside the transfer as to the nonconsenting spouse's interest. Prob C §5121. In addition, a spouse's written consent may be revoked at any time during the marriage or on termination of the marriage. Prob C §5030.

Finally, creditors of the deceased holder of a POD or Totten trust account may have rights against the beneficiary for debts of the decedent if the initial transfer was fraudulent. Prob C §5202.

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§7.14 F. Assets With Designated Beneficiaries

Assets such as insurance policies, employee pensions, and retirement accounts all offer opportunities to designate beneficiaries to receive benefits or assets on the death of the asset holder. If the client does not complete a beneficiary designation, the plan document or the policy will provide for a default beneficiary, which is usually either the client's estate or closest living relative. From an estate planning perspective, this is usually an unwanted result. Therefore, it is extremely important that the attorney review the client's beneficiary designations as part of the estate planning process. In many cases the beneficiary designations will have to be revised to create a coordinated estate plan.

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§7.15 1. Retirement Plans

The term "retirement plan" as used in the chapter refers to an income-tax-deferred plan—typically an IRA (IRC §408(a)), IRC §§401(k), 403(b), or 457 plan, or other plan to which pretax dollars are contributed by the client. On Roth IRAs, see §7.20. The assets in the retirement plan grow tax-free and then are subject to income tax when they are received by the client or are required to be distributed to the client. Because of the income-tax-deferred nature of retirement plans, the beneficiary designations must be carefully considered.

Some plan administrators who might reject an attorney-drafted beneficiary designation form originally submitted that, *e.g.,* names a trust or a minor, can be helpful in informing the attorney of language that achieves the client's goals, conforms to the IRS regulations, and is acceptable to the plan. If no resolution of the problem is reached, at least the client will be informed and might consider outright designation of individuals as beneficiaries.

For more thorough coverage of employee benefits and IRAs, see California Estate Planning, chap 21 (Cal CEB 2002).

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§7.16 a. Spouse as Beneficiary

In almost all cases in a simple estate plan, if the client is married, the client's spouse will be named as the primary beneficiary of the client's retirement plan. On the owner's death, the surviving spouse will be able to treat the IRA as his or her own, or will be able to roll over the IRA into an IRA in his or her own name. Treas Reg §1.408-8, A-5, A-7. In either case, the surviving spouse can name designated beneficiaries, and the minimum distribution rules will be applied using the uniform tables, which reflect the current life expectancy of the spouse and a hypothetical beneficiary who is 10 years younger, and then on the single life expectancies of the spouse's designated beneficiaries, which typically provides an extended period of tax deferral. If the spouse is under age 70½, these rules result in a suspension of required distributions until that age.

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§7.17 b. Nonspouse Beneficiaries

Before the enactment of the Pension Protection Act of 2006 (Pub L 109-280, 120 Stat 780), a beneficiary other than a spouse could not roll over an employer-sponsored retirement plan account, such as a 401(k) or a profit-sharing plan, into an IRA. The Pension Protection Act of 2006 allows nonspouse designated beneficiaries to make a postmortem distribution (after 2006) to an IRA subject to certain restrictions. The IRA must be funded using a direct trustee-to-trustee transfer. IRC §402(c)(11). The IRA is treated as an inherited IRA and must be maintained in the name of the deceased employee. IRC §402(c)(11)(A)(ii). The beneficiary is not taxed on the rollover and will be taxed only when distributions are made.

Nonspouse beneficiaries of decedents' retirement plans can make rollovers directly to Roth IRAs, subject to certain requirements, as well as to traditional IRAs. Notice 2008-30, 2008-12 Int Rev Bull 638.

The ability to make a postmortem rollover is an important benefit for nonspouse beneficiaries, such as domestic partners, children, or friends of the deceased participant. By making a rollover to an IRA, the beneficiary can stretch out IRA withdrawals over his or her life expectancy. Many plans require either immediate distribution of retirement plan benefits or distribution within only a few years, even when the IRC §409(a)(9) minimum distribution rules do not compel such distribution. For minimum distribution rules, see §§6.21-6.24. If the plan participant dies before starting to take distributions, most plans require immediate distribution of everything in the plan. Because the distribution is income to the beneficiary, the result often is that the beneficiary must pay a large part of the distribution as income taxes.

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§7.18 c. Minors as Beneficiaries

Most clients with children name their children as contingent beneficiaries of their retirement plans if married, and primary beneficiaries if unmarried. If a child or other beneficiary is a minor and significant assets are to be distributed to the minor, a guardianship of the minor's estate might be required unless the beneficiary designation naming either a trust for the benefit of the minor or a custodian under the California Uniform Transfers to Minors Act (CUTMA) (Prob C §§3900-3925) (see §7.40 for sample CUTMA language) is completed correctly and in a format acceptable to the plan administrator.

PRACTICE TIP: Some plans do not accept designation of a custodian for a minor beneficiary under CUTMA. Some plans require establishment of a court-supervised guardianship of the estate. Attorneys who lack expertise in estate planning for retirement plans should not prepare beneficiary designation forms naming trusts for minors as retirement plan beneficiaries and should not draft revocable trusts with provisions for holding and administering proceeds of a retirement plan. For further discussion, see §7.19.

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§7.19 d. Trust as Beneficiary

If the trust is named as the beneficiary, the client will be more easily able to amend the estate plan and, if estate taxes are due, the trustee can withhold the necessary funds in advance and avoid the necessity of collecting each transferee's legal share.

However, there are several obstacles to naming a trust as beneficiary, most importantly the complex IRC requirements regarding "designated beneficiaries." See California Estate Planning §21.44 (Cal CEB 2002). If the beneficiary designation and trust document do not conform to the Internal Revenue Code requirements and Treasury regulations, naming a trust as a beneficiary could cause income tax to be payable in a lump sum, or at best over 5 years. Treas Reg §1.401(a)(9)-3, A-1. Another disadvantage is that the revocable trust assets are liable for the debts of a deceased settlor. Prob C §19001.

PRACTICE TIP: An attorney who is preparing a simple estate plan for a client generally should not draft trust provisions naming a trustee to hold and administer retirement plan proceeds in conjunction with designating the trustee as the beneficiary of a retirement plan account for the benefit of the beneficiary. If the attorney drafts such a plan, however, he or she should consult an estate planning attorney who is an expert in this area and should have the draft documents reviewed by the expert. In addition, it is good practice to submit the drafts to the plan administrator for advance approval before the client signs the documents.

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§7.20 2. Roth IRAs

Although Roth IRAs are "retirement plans," they differ from other retirement plans in that post-tax dollars are contributed to the Roth IRA. IRC §408A(a). Neither the assets in the Roth IRA nor the distributions from it are subject to income tax.

Because the assets in the Roth IRA are not subject to potential income tax liability and predeath minimum distribution rules, the concerns raised in §7.19 with respect to naming a trust as beneficiary are not as important with respect to a Roth IRA. However, the requirements of Treas Reg §1.401(a)(9)-4, A-5(b), regarding naming a trust as beneficiary still must be met. Moreover, if the client is married, the attorney must consider the spouse's rights in the Roth IRA before naming a trust whose beneficiary is not the spouse.

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§7.21 3. Life Insurance

Life insurance proceeds do not have the same income tax ramifications as retirement plan distributions because life insurance proceeds payable at death are generally not subject to income tax. IRC §101(a)(1). Life insurance companies are generally prompt in distributing the proceeds of a life insurance policy to the beneficiary or beneficiaries. Therefore, if the life insurance policy payout is for a small amount and the proceeds will be used primarily to make small gifts to family, friends, or nonprofit organizations, naming the individual, individuals, or the nonprofit as the beneficiary is simple. Even if the policy is larger, if the entire estate will be distributed, *e.g.,* to adult children, a partner, or others, the client may choose to name them directly as the beneficiaries, even if the client has also created a revocable trust.

For larger policy amounts, however, if the client creates a revocable trust, the client should consider naming the trustee as the beneficiary. The complex rules for naming a revocable trust as a designated beneficiary do not apply to life insurance beneficiary designations. The insurance proceeds can provide the trustee with a source of ready funds for payment of expenses, debts, and taxes on the client's death. Whether the client is married or unmarried, naming the trust as the beneficiary permits distributions to be made in accordance with the dispositive provisions of the trust—including provisions covering a wide variety of contingencies, and provisions for continued trustee management in the event distributions would otherwise be made to minors or other younger beneficiaries.

Married clients who create a revocable trust and who do not have estate tax considerations might choose to name each other or the trust as the primary beneficiary. However, if the married clients are creating a revocable trust that will divide into subtrusts at the first death, it is advisable to name the trust as beneficiary; cash proceeds are useful in allocating assets to the subtrusts, especially in funding the bypass trust (see chap 3).

Another advantage of naming a trust as beneficiary is that many life insurance companies automatically move life insurance proceeds to a separate account at the death of the insured. If, at the time of death of the insured policy owner, the named beneficiary is incapacitated, the funds may remain in the account in the beneficiary's name. If no further action is taken, the beneficiary's estate may be subject to probate. Additionally, even if there is a pourover will that pours over assets to a trust, there may be a delay in transferring the proceeds to the trust.

NOTE: Life insurance proceeds are includable in the decedent's gross estate if they are receivable by or for the benefit of the decedent's estate, or, if the decedent possessed any incidents of ownership in the insurance at death. IRC §2042; Treas Reg §20.2042-1. Therefore, the attorney should be cautious in creating an estate plan for someone whose estate is large enough to result in an estate tax at death if the proceeds are included in that person's estate. The attorney should have sufficient expertise in drafting the estate plan to avoid this result, which is most usually achieved by creating an irrevocable life insurance trust. For irrevocable life insurance trusts, see Drafting California Irrevocable Trusts, chap 11 (3d ed Cal CEB 1997).

For an unmarried client, naming a revocable trust as beneficiary may be particularly desirable if the insurance proceeds will be used primarily to provide for the settlor's minor dependents or other relatively young beneficiaries, or to provide for the client's partner, or will be divided among many beneficiaries. If the insurance amount is not large, an alternative to naming a revocable trust to receive proceeds for a minor is to name a custodian under the California Uniform Transfers to Minors Act (CUTMA) to receive the proceeds. See §7.40 for discussion of CUTMA accounts and suggested beneficiary designation language.

PRACTICE TIP: The attorney should review a copy of the client's insurance policies and current declaration pages. If, for example, the client is counting on using insurance proceeds from an employer-funded policy to make gifts, the client should understand that there may be no gift if the client retires or terminates employment.

A review of the beneficiary designation is particularly important if the client has terminated a marriage. In *Life Ins. Co. of N. Am. v Ortiz* (9th Cir 2008) 535 F3d 990, the court awarded the bulk of the proceeds of a decedent's life insurance policy to his ex-wife because the decedent had neglected to change the beneficiary designation on dissolution of the marriage and the property settlement agreement had not specifically mentioned the policy. The

decedent's surviving spouse and children received no part of the life insurance proceeds.

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§7.22 G. Joint Tenancy

Property held in joint tenancy is property that is owned in undivided equal shares by two or more persons. Both real and personal property (such as bank or brokerage accounts and automobiles) may be held in joint tenancy. The most important feature of joint tenancy is the right of survivorship. CC §683.2(c). The property passes immediately on death to the surviving joint tenant(s) by operation of law, thus avoiding probate proceedings and the attendant costs and delays in distribution inherent in probate administration. Even if probate administration is required to distribute other assets, joint tenancy property passes outside the provisions of a will or, if there is no will, the laws of intestacy.

There is an exception to avoidance of probate. In the event of "simultaneous death" of the joint tenants (*i.e.,* when there is no clear and convincing evidence that one survived the other), the property held in joint tenancy will be administered, distributed, or otherwise treated half as if one joint tenant had survived the other, and half as if the other joint tenant had survived. Prob C §223(b). A similar rule applies to joint tenancies of more than two joint tenants. Prob C §223(c).

For joint tenancy property owned by a husband and wife, one-half is included in the decedent's estate for estate tax purposes; otherwise, the entire value is included except to the extent that the surviving joint tenant can show contribution to its cost. IRC §2040.

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§7.23 1. Creating and Severing Joint Tenancy

Taking title to property as joint tenants is not difficult or complicated. Title to personal property (*e.g.,* accounts or automobiles) should be designated as "*A* or *B,* as joint tenants." The provisions of Prob C §§5100-5407 govern the creation of a joint tenancy in a bank deposit. See CC §683(b); Fin C §852. Establishing joint tenancy in real property requires only preparation and execution of a deed transferring title to oneself and one or more other persons as joint tenants. See chap 12 on preparing real property deeds.

NOTE: Holding title to a safe deposit box in joint tenancy does not establish a joint tenancy interest in the contents of the box. CC §683.1.

On the death of a joint tenant, it is easy to clear title. For example, title to real property can be cleared by recording an affidavit of death of joint tenant together with a death certificate with the county recorder's office. See Prob C §§210-212.

Any joint tenant of real property may sever his or her interest without the joinder or consent of the other joint tenants. CC §683.2(a). Severance can be accomplished by the execution and delivery of a deed conveying legal title to the joint tenant's interest to a third person (even if that person is a "straw person" and required by preagreement to reconvey title to the joint tenant), by execution of a written instrument that shows the intent to sever the joint tenancy, or by a deed conveying title to the undivided interest from the joint tenant to himself or herself (as tenant in common). CC §683.2. A unilateral severance is not effective unless (1) before the death of the severing joint tenant, the written instrument is recorded in the county in which the property is located, or (2) the written instrument is executed no earlier than 3 days before the death of the severing joint tenant and recorded within 7 days after that joint tenant's death. CC §683.2(c).

See chap 12 for further discussion and for sample language for creating and unilaterally severing a joint tenancy in real property by executing a deed.

NOTE: A joint tenancy between the decedent and a former spouse or domestic partner, created before or during the marriage or domestic partnership, is severed if the former spouse or partner is not the transferor's surviving spouse or surviving domestic partner at the time of death, because the marriage or domestic partnership has been dissolved or annulled. Prob C §5601(a).

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2. Planning Issues

§7.24 a. Disadvantages

Thwarting Uninformed Testator's Intentions: Property held in joint tenancy cannot be transferred by will or trust, and the intentions of a testator who does not understand this may be thwarted if the joint tenancy conflicts with the testamentary provisions in a will or trust (*e.g.*, when the will of the deceased person devises the residue to someone other than the surviving joint tenant).

One Dimensional: Joint tenancies provide one-dimensional planning, *i.e.,* they transfer the asset to the surviving joint tenant. There is no opportunity to include an alternative plan if both joint tenants are deceased. The better strategy is to sever the joint tenancy so that each party owns a tenancy-in-common interest that can be separately devised. Each party can then provide in his or her will or trust for transfer of the asset to the other on death, with an alternative plan to take effect if the primary beneficiary has died.

Loss of Control: Joint tenancy bank accounts are often established not only to transfer assets at death but also to facilitate assistance with money management for a person with disabilities or facing incapacity. An elderly parent, for example, may add his or her child as a joint tenant on his or her bank account so that the child can manage the income and pay bills. Even though joint accounts belong to the parties in proportion to their net contribution to that account, absent any clear and convincing evidence to the contrary (Prob C §5301(a)) a joint tenant has the ability to withdraw all of the assets of the account regardless of who contributed the property to the account. See Prob C §§5201, 5301, 5401. Thus, there is an obvious disadvantage to this form of holding title if the client's joint tenant is not trustworthy.

Similar potentially serious disadvantages attach to holding real property in joint tenancy. Executing a deed establishing a joint tenancy creates an immediate present interest in the property and the transferor loses the ability to control the ultimate disposition of the property. The joint tenant may also "break" the joint tenancy by transferring his or her interest to himself or herself or by selling or transferring his or her interest to a third person without the consent or knowledge of the original property holder. As a result of such a sale or transfer breaking the joint tenancy, the original property holder may own the property with a stranger, will not be able to control the ultimate disposition of the property, and will have lost the right of survivorship. In addition, the property will be subject to the debts of the joint tenant.

Creditor's Rights: A disadvantage of joint tenancy in either real or personal property is that assets held in joint tenancy may be reached by the creditors of any joint tenant during the debtor joint tenant's lifetime. A creditor can, for example, look to the joint bank account for satisfaction of a debt. Note, however, that because a deceased joint tenant's interest ceases on death, his or her creditors have no rights in the joint tenancy property after the debtor dies. This is true even if the creditor had a judgment lien or even an execution lien on the joint tenancy property but the lien has not resulted in an execution sale before the joint tenant's death. *Grothe v Cortlandt Corp.* (1992) 11 CA4th 1313, 15 CR2d 38.

Possible Adverse Tax Consequences: Before placing property in joint tenancy, the client should be made aware of the possible adverse tax consequences. The creation of the interest may trigger a gift tax. There may also be an increased capital gains tax on a later sale of the property, because the income tax basis of property differs depending on whether it is received as a gift or by inheritance. Moreover, in any joint tenancy real property transfer, the issue arises of whether it constitutes a change of ownership that triggers reassessment. See chap 3 regarding basis and real property tax.

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b. When Severance May Be Advantageous

§7.25 (1) Distribution to Other Than Joint Tenant Desired

After taking title to real property as joint tenants, friends, registered domestic partners, or unregistered domestic partners may later decide that they want individual control over their respective interests in the property. For example, each joint tenant may want to provide for postdeath distribution of his or her interest to a third party, or distribution of a life estate to the surviving joint tenant with the remainder going to a third party at the survivor's death. In such cases, the joint tenancy must first be severed. See §7.23 on severance. Once the joint tenancy is severed, each former joint tenant can dispose of his or her share, which is now held as a tenancy in common, and transfer that interest by his or her will or trust.

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§7.26 (2) For Married Couples

In California, because real property can be purchased without the services of an attorney, many clients receive advice regarding how to take title to their real property from their real estate broker, title officer, or neighbor and take title to property as joint tenants, even if the property is acquired with community property funds and holding title as community property or as community property with right of survivorship (CC §682.1) is more advantageous for income tax purposes. See §§7.27, 7.30.

When property is held in joint tenancy, on the death of a spouse the property is considered to be one-half the separate property of the deceased spouse and one-half the separate property of the surviving spouse. IRC §2040(b); CC §683. (The Fam C §2581 presumption that joint tenancy property acquired during the marriage is community property does not apply on death.) For income tax purposes, this could be quite costly because only the one-half owned by the deceased spouse receives a step-up in basis to the date-of-death value for capital gains purposes in the event of a subsequent sale or transfer. IRC §1014(a). If the property is community property, the entire property (even the interest owned by the surviving spouse) receives a step-up in basis on the death of the first spouse. IRC §1014(b)(6).

It is generally advisable, for the reasons described above, to transmute real property from joint tenancy to community property or community property with right of survivorship. Transmutation to community property must be in writing by an express declaration by the spouse whose interest in the property is adversely affected. Fam C §852. Thus, the presumption created by a joint tenancy deed may be rebutted only by written agreement.

If the spouses intend to create a revocable trust that divides into two or three trusts at the death of the first spouse to die in order to take advantage of the deceased spouse's applicable exclusion amount, it will be necessary to sever a joint tenancy in real property and then transfer the property as community property to the trust. For discussion of the steps for transferring title from joint tenancy to community property and then from community property to the couple's revocable trust, or to community property with right of survivorship, see chap 12.

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§7.27 H. Community Property With Right of Survivorship

Property owned as community property with right of survivorship under CC §682.1 retains all the features of community property (including receipt of a new basis on death for both halves, at least with respect to community property of spouses under IRC §1014 and possibly with respect to community property of registered domestic partners for California income tax purposes, or eligibility for allocation of aggregate basis increase for both halves under IRC §1022 for decedents dying in 2010), except that the property passes on death to the survivor, without administration, in the same manner as joint tenancy property. In other words, this form of title combines the advantages of a community property designation and the right of survivorship.

For many registered domestic partners, and for married clients who have decided not to create a joint revocable trust, who want their spouse or partner to take their interest in the community property real property when they die, this method of holding title may be the best option. The surviving spouse or partner will not have to go through a probate or other court proceeding. On the death of one of the spouses or partners, the property will be subject to the same simple procedures as property held in joint tenancy. CCP §682.1(a). For language that must be included in a deed to take title as community property with right of survivorship, see chap 12.

Possible disadvantages are similar to those for joint tenancy. As with joint tenancy property, no further planning is possible because the property vests in the surviving spouse or registered domestic partner at the moment of the decedent's death. If the surviving spouse or partner retains the property until death, it is usually included in the estate and is subject to estate taxes and probate administration. In addition, community property with right of survivorship appears to be community property for purposes of liability for debts, and would therefore generally be liable for the debts of either spouse or domestic partner. In some cases, true joint tenancy might provide better asset protection, particularly with respect to debts of the deceased spouse.

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§7.28 I. Types of Property Governed by Will, Trust, or the Laws of Intestacy

In some cases, the form of ownership determines how property will be managed during the owner's lifetime and how it will be distributed at the owner's death. If the owner of title is the trustee of the trust, the trust document controls. If an account, *e.g.,* a bank account, is payable on death or is a retirement account, *e.g.,* an IRA, with a designated beneficiary, the owner or his or her agent under a power of attorney controls and manages the account during the owner's lifetime and at death title vests in the beneficiaries.

Property held in other forms of title may be governed by the owner's will, trust, or by the laws of intestate succession. Two prime examples are property held by the owner as a tenant in common and property held as community property.

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§7.29 1. Tenancy in Common

A tenancy in common is a co-ownership interest in which there is no right of survivorship. CC §685. The cotenancy interests may be unequal and each cotenant may devise his or her interest in the property by will, trust, or otherwise. The client should be informed that in the absence of a will, trust, or other dispositive provision, the client's interest in the property will be distributed to his or her nearest relatives under the laws of intestate succession. Prob C §§6400-6414.

Unmarried persons who jointly own property may own the property as tenants in common. Because the high price of real property has made it difficult for many individuals to purchase a home of their own, it is increasingly common for friends or others to pool their funds in order to purchase multi-unit residential real property. Each tenant then can create an estate plan in which he or she disposes of his or her interest in the property as he or she wishes, either under the terms of a will or under a revocable trust.

PRACTICE TIP: In either case, on the death of a co-tenant, there may be serious problems for the surviving tenant as well as the beneficiary if they do not agree about the occupancy and management of the property. For these parties, it is recommended that they create a property agreement before they purchase property together. The estate planning attorney may need to refer them to an attorney who specializes in these property agreements.

Usually married clients do not hold property as tenants in common. However, if they acquired property together before they married, title may have been taken in their names as tenants in common. Assuming that the property is their community property, married clients should not hold title to real property as tenants in common. On the death of one of the spouses, the property will be treated as though each spouse owned a separate property interest; the survivor would have no right of survivorship. If the married couple has a trust, they can transfer title to the property either to community property and then into their trust, or they can transfer title to themselves as community property with right of survivorship. For discussion of transmutation and sample language for these transfers, see chap 12.

If a client who is a tenant-in-common owner of an interest in property holds his or her interest solely in his or her name, *i.e.,* not in a trust, a durable power of attorney giving the agent authority to manage the client's property in the event of incapacity should be included in the estate plan.

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§7.30 2. Community Property

Married clients and registered domestic partners may hold title to property as community property. On the death of a person with a spouse or registered domestic partner, one-half of the community property belongs to the surviving spouse or partner and the other half to the decedent. Prob C §100; Fam C §297.5. Each spouse or partner may dispose of his or her half of the community property in his or her will or trust, or otherwise. If no estate plan has been put in place, the surviving spouse or partner may have to go to court to petition to obtain a court order that passes the deceased spouse's or partner's half of the community property to the surviving spouse or partner. The petitioner may be required to prove that the property was, in fact, community property.

When title is held as community property, on the death of the first spouse (but not domestic partner) to die, both halves of the property receive a step-up in basis to the date-of-death value. IRC §1014(b)(6). Therefore, when basis considerations are significant, *e.g.,* when a married couple's home was purchased during the marriage and has increased significantly in value, counsel should make every effort to establish definitively that the property is community property. If title was taken as joint tenants, in particular, the attorney should advise the clients of the tax benefits of community property.

Married clients whose estates will clearly result in an estate tax and who hold title to property as community property should be alerted to the problem that might occur at the second death. If they do not create an estate plan while both spouses are alive that allows maximum use of the applicable exclusion amount of the first spouse to die, the surviving spouse's estate may, at his or her death, be subject to estate tax that could have been avoided or minimized.

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§7.31 III. MINORS

Perhaps the most important questions that parents must address in estate planning are:

- Who will have physical custody and make personal care decisions if the parents are unable to do so?
- If the minor has inherited or will inherit money or property, whether from the parent or from a third party, who will manage and protect the estate?
- Should the same person assume both roles or should the responsibility for care of the child's person and care of the child's estate be divided between two or more individuals?

In planning for gifts to minors, whether for the clients' children, other family members, or a nonrelative, a number of specific questions must be addressed. How much should the child receive? At what age? How will the minor's gift be managed before adulthood? How much control does the donor wish to retain over the gift? Does the gift have the potential to create a generation-skipping transfer (GST) tax issue? See chap 3 on GST. The answers to these questions will depend in part on the specific needs of the child and the nature of the assets to be managed.

Generally speaking, minors (defined as persons under the age of 18; Fam C §6500) lack the legal capacity to consent to their own medical treatment (with certain exceptions; Fam C §§6920-6929) and cannot contract or exercise the rights and powers of ownership over property (Fam C §§6700-6753). Alternative mechanisms must therefore be established to allow a designated person to act for the minor.

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A. Care of the Minor's Person

§7.32 1. When Guardianship Not Required

As long as the parents are alive, they are responsible for the health, education, and welfare of their minor child or children. If one parent dies, is unable or refuses to take custody, or has abandoned the child, the other parent is entitled to sole custody of the minor child or children. Fam C §3010(b). If neither parent is alive, however, a guardianship of the person usually is required.

If the child's need for an alternate caretaker is temporary, a formal guardianship may not be necessary. Statutory authority exists for certain decisions to be made without establishing a formal guardianship. For example, a parent may sign a writing delegating authority to make medical decisions for the child to the adult person who has temporary care of the minor. Fam C §6910. For sample form, see §7.33. Similarly, by signing an affidavit a voluntary caregiver who is a qualified relative (as defined in Fam C §6550(h)(2)) may authorize medical treatment, including mental health treatment, to the same extent as a guardian. Fam C §6550. For sample affidavit, see §7.34. The voluntary caregiver must complete items 1 through 8. If a child is in the temporary custody of another, that person may enroll the child in school and may consent to school-related medical treatment. Fam C §6550(h)(3). The temporary caregiver must complete items 1 through 4 of the affidavit in §7.34. However, if the parent has died or is disabled to such an extent that he or she cannot provide care for the child, a formal guardianship will usually be required.

For further discussion of alternatives to guardianship, see California Guardianship Practice, chap 2 (Cal CEB Annual).

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Source: Estate Planning/Complete Plans for Small and Mid-Size Estates/7 Planning Devices and Issues: An Overview/ §7.33 a. Form: Authorization for Care Provider to Consent to Medical or Dental Treatment of Minor (Fam C §6910)

§7.33 a. Form: Authorization for Care Provider to Consent to Medical or Dental Treatment of Minor (Fam C §6910)

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7.33-1 Authorization for care provider to consent to medical or dental treatment of minor

AUTHORIZATION FOR _ _[*NAME*]_ _, CARE PROVIDER, TO CONSENT TO MEDICAL OR DENTAL TREATMENT OF _ _[*NAME*]_ _, A MINOR

To Whom It May Concern:

The undersigned, _ _[*the parents/one of the parents having legal custody/the parent having legal custody/the legal guardian/a caregiver with authority under Fam C §6550*]_ _ of _ _[*name*]_ _, a minor, born on _ _[*date*]_ _, authorizes _ _[*name*]_ _, an adult person into whose care the minor has been entrusted, to consent to X-ray examination, anesthesia, medical or surgical diagnosis and treatment, and hospital care to be rendered to the minor under the general or special supervision of a physician and surgeon licensed under the Medical Practice Act, or to consent to an X-ray examination, anesthesia, dental or surgical diagnosis and treatment, and hospital care to be rendered to the minor by a dentist licensed under the Dental Practice Act, or both.

[*If applicable, add one or both of the following options*]

[*Option 1: Authority to surrender minor to person other than parent*]

The undersigned authorizes any hospital that has treated the minor to surrender physical custody of _ _[*him/her*]_ _ to _ _[*name of custodian*]_ _.

[*Option 2: Dates of validity of authorization*]

This authorization is valid from _ _[*date*]_ _ to _ _[*date*]_ _.

[*Continue*]

IN WITNESS WHEREOF, _ _[*I/we*]_ _ have executed this medical authorization at _ _ _ _ _ _, California, on _ _[*date*]_ _.

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _

STATE OF CALIFORNIA)
COUNTY OF _ _[*name of county*]_ _) ss
)

Subscribed and sworn to (or affirmed) before me on this _ _[*number*]_ _ day of _ _[*month*]_ _, 20_ _, by _ _[*name(s)*]_ _, proved to me on the basis of satisfactory evidence to be the person(s) who appeared before me.

WITNESS my hand and official seal.

__[*Signature of officer*]__ [*Officer's seal*]

Comment: Family Code §6910 does not require that the authorization be notarized. However, many hospitals and

medical providers view the authorization form as equivalent to a health care power of attorney, requiring either two witnesses or acknowledgment by a notary. Although notarization is not required by statute, the form includes the notary jurat because it is often less time-consuming to have the form notarized than to argue with the provider.

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Source: Estate Planning/Complete Plans for Small and Mid-Size Estates/7 Planning Devices and Issues: An Overview/ §7.34 b. Form: Caregiver's Authorization Affidavit (Fam C §6552)

§7.34 b. Form: Caregiver's Authorization Affidavit (Fam C §6552)

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7.34-1 Caregiver's authorization affidavit

CAREGIVER'S AUTHORIZATION AFFIDAVIT

Use of this affidavit is authorized by Part 1.5 (commencing with Section 6550) of Division 11 of the California Family Code.

Instructions: Completion of items 1-4 and the signing of the affidavit are sufficient to authorize enrollment of a minor in school and authorize school-related medical care. Completion of items 5-8 is additionally required to authorize any other medical care. Print clearly.

The minor named below lives in my home and I am 18 years of age or older.

1. Name of minor: _____

2. Minor's birth date: _____

3. My name: (adult giving authorization) _____
_____

4. My home address: _____

5. I am a grandparent, aunt, uncle, or other qualified relative of the minor (see below for a definition of "qualified relative").

6. Check one or both (for example, if one parent was advised and the other cannot be located):

[ ] I have advised the parent(s) or other person(s) having legal custody of the minor of my intent to authorize medical care, and I have received no objection.

[ ] I am unable to contact the parent(s) or other person(s) having legal custody of the minor at this time to notify them of my intended authorization.

7. My date of birth: _____

8. My California driver's license or identification card number:
_____

Warning: Do not sign this form if any statement above is incorrect, or you will be committing a crime punishable by a fine, imprisonment, or both.

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

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _

Notices:

1. This declaration does not affect the rights of the minor's parents or legal guardian regarding the care, custody, and control of the minor, and does not mean that the caregiver has legal custody of the minor.

2. A person who relies on this affidavit has no obligation to make any further inquiry or investigation.

Additional Information:

TO CAREGIVERS:

1. "Qualified relative," for purposes of item 5, means a spouse, parent, stepparent, brother, sister, stepbrother, stepsister, half-brother, half-sister, uncle, aunt, niece, nephew, first cousin, or any person denoted by the prefix "grand" or "great," or the spouse of any of the persons specified in this definition, even after the marriage has been terminated by death or dissolution.

2. The law may require you, if you are not a relative or a currently licensed foster parent, to obtain a foster home license in order to care for a minor. If you have any questions, please contact your local department of social services.

3. If the minor stops living with you, you are required to notify any school, health care provider, or health care service plan to which you have given this affidavit. The affidavit is invalid after the school, health care provider, or health care service plan receives notice that the minor no longer lives with you.

4. If you do not have the information requested in item 8 (California driver's license or I.D.), provide another form of identification, such as your Social Security number or Medi-Cal number.

TO SCHOOL OFFICIALS:

1. Section 48204 of the Education Code provides that this affidavit constitutes a sufficient basis for a determination of residency of the minor, without the requirement of a guardianship or other custody order, unless the school district determines from actual facts that the minor is not living with the caregiver.

2. The school district may require additional reasonable evidence that the caregiver lives at the address provided in item 4.

TO HEALTH CARE PROVIDERS AND HEALTH CARE SERVICE PLANS:

1. A person who acts in good faith reliance on a caregiver's authorization affidavit to provide medical or dental care, without actual knowledge of facts contrary to those stated on the affidavit, is not subject to criminal liability or to civil liability to any person, and is not subject to professional disciplinary action for that reliance if the applicable portions of the form are completed.

2. This affidavit does not confer dependency for health care coverage purposes.

Comment: No court involvement is needed. The affidavit must be in substantially the same form as that set forth in Fam C §6552. Note that it does not require notarization but does include a declaration under penalty of perjury. The affidavit may be given to the school, health care provider, or health care service plan.

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§7.35 2. Guardianship of the Person

A parent may nominate a guardian in a will or other writing. Prob C §§1500, 1502. The court may appoint a guardian of the person on petition by the nominee or any interested party for any minor whose parent is deceased, absent, or unavailable to provide care for the minor. Prob C §§1510, 1514(b).

Probate Code §2105(f) permits the appointment of a terminally ill custodial parent as joint guardian of the person with his or her nominee if certain conditions are met. For the appointment to be made, the custodial parent must be terminally ill, he or she must nominate a joint guardian of the person, and either the noncustodial parent (if any) must not object to the appointment or the court must find that the noncustodial parent's appointment as custodial parent would be detrimental to the minor and that appointment of the nonparent would be in the minor's best interest. Fam C §3041. At the custodial parent's death, the joint guardian will retain the powers of the guardian of the person until further order of the court. Prob C §2105(d). The appointment of joint guardians under §2105 is intended to minimize the emotional stress on the terminally ill custodial parent and the emotional stress and disruption of the minor's life when the parent dies.

The guardian of the person is responsible for providing for the minor's housing, personal needs, medical care, and education. Prob C §§2351, 2352(a), 2353. Note that there are some restrictions on the types of medical care a guardian can authorize. Absent a court order, a guardian may not consent to involuntary placement in a mental health facility, may not consent to use of experimental drugs or convulsive therapy, and may not authorize sterilization of the minor. Prob C §2356.

A guardian of the person remains under court supervision, and, in general, is required to file periodic status reports detailing the child's health and progress in school and noting any special needs or problems. Prob C §1513.2; Cal Rules of Ct 7.1003; Confidential Guardianship Status Report (Judicial Council Form GC-251).

A guardianship of the person terminates automatically when the minor turns 18. Prob C §1600; Cal Rules of Ct 7.1004(b).

On guardianships in general, see California Guardianship Practice (Cal CEB Annual).

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§7.36 B. Care of the Minor's Estate

Although a surviving parent has the care and custody of a child without any formal action, that authority does not extend to management of the child's estate. See Fam C §7502. Consequently, the child's estate must be managed either according to the provisions of advance planning documents or as governed by statutory authority. A number of mechanisms can be used to manage a minor's assets, depending on the size of the estate and the level of protection desired or required.

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§7.37 1. Payment or Delivery to Parent

If a minor does not have a guardian of the estate, money or other property belonging to the minor may be paid or delivered to the minor's custodial parent to be held for the minor's benefit until he or she reaches the age of 18. Prob C §3401. This method may be used only if the minor's total estate, including the money and other property to be paid or delivered to the parent, does not exceed $5000. Delivery of the minor's money or other property to the parent under Prob C §§3400-3402 is an efficient way to handle small bequests or other gifts and requires no advance planning. The written receipt of the parent is sufficient to relieve the transferor of the money from liability. Prob C §3402.

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§7.38 2. Form: Written Assurance of Parent (Prob C §3401(c)(2))

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7.38-1 Written assurance of parent

WRITTEN ASSURANCE AND AGREEMENT TO HOLD MINOR'S ASSETS IN TRUST

I, _ _[*name of declarant*]_ _, declare:

I am one of the parents of _ _[*name*]_ _, a minor, and am entitled to custody of _ _[*him/her*]_ _. The minor is entitled to _ _[*describe minor's entitlement, e.g., distribution from the estate, proceeds as beneficiary of life insurance policy*]_ _.

The total value of the minor's estate, including the aforementioned assets to be paid or delivered to me, does not exceed $5000. I agree to hold the assets in trust for the benefit of the minor, to account to the minor for all of the assets, and to pay or deliver the same to the minor when the minor reaches the age of majority. On payment or delivery of the assets to me, I agree to execute a receipt for the assets and fully release and hold harmless _ _[*describe person paying or delivering the money or property*]_ _ for the assets so paid.

I declare under penalty of perjury under the laws of the State of California that the foregoing written assurance is true and correct and that this declaration is executed at _ _ _ _ _ _.

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _

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§7.39 3. Court-Ordered Blocked Account

If the child's estate exceeds $5000 and the minor has no guardian of the estate, a court may authorize that the money be deposited in a blocked account or may authorize the purchase of a single-premium deferred annuity. Prob C §3413(a). No withdrawals may be made from a blocked account except on court order, and the balance must be paid to the minor at age 18. Prob C §§3300, 3413(a). Once distributed, there are no restrictions on the use of the funds.

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§7.40 4. Transfer to Custodian Under California Uniform Transfers to Minors Act

The California Uniform Transfers to Minors Act (CUTMA) (Prob C §§3900-3925) provides a mechanism for holding and managing a minor's funds or other property without establishing a formal guardianship. A custodianship is created by using the words "to [name], as custodian for [name of minor] (minor) under the California Uniform Transfers to Minors Act" in the document transferring the assets. Prob C §3909. The transferor can nominate a custodian in a will, trust, or other instrument, including an instrument exercising a power of appointment. Prob C §3903(a). Although only one custodian can be appointed, successor custodians may be nominated to serve if the first named custodian is unavailable or unwilling to act or to continue to act. Prob C §3903(a).

Custodial property is not created until the nominating instrument becomes irrevocable or until transfer to the custodian is completed. See Prob C §3903. CUTMA gifts qualify for the $10,000 (plus cost-of-living adjustments) annual gift tax exclusion under IRC §2503(b). There are no restrictions on how the beneficiary may use the funds once he or she reaches the age of termination and receives distribution of the remaining funds. See Prob C §§3903(c), 3920.

Unless otherwise specified in the instrument creating the CUTMA gift, the custodial property must be distributed when the minor reaches age 18 (or the minor dies). Prob C §§3920(a), 3920.5(g). Although custodianships are generally established for minors, transfer of custodial property can be delayed beyond 18 years of age if the instrument provides for distribution at a later age. Prob C §3920.5. However, inter vivos gifts must be transferred by age 21, and custodianships established by will, trust, or exercise of an irrevocable power of appointment must terminate by age 25. Prob C §3920.5.

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§7.41 a. Advantages

The primary advantage of a CUTMA custodianship is the ease with which it can be established. A custodianship is inexpensive because no court proceedings are needed to establish or maintain it. A formal trust document is not required, nor is a bond or accounting, except at the request of the minor. Prob C §3919. Most banks and brokerage firms are readily familiar with custodial accounts. A custodial account gives the custodian greater discretion than a guardianship in the use of the funds. See §7.44. Although the money belongs to the minor, the custodian may use the funds for the minor's benefit as long as the funds are not used to fulfill parental support obligations such as food, clothing, shelter, or ordinary medical care. Prob C §3914(a), (c). The funds can be used for college education or for such "extras" as computers, summer camp, or other enrichment activities.

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§7.42 b. Planning Issues

Each CUTMA account may have only one beneficiary and one custodian. Prob C §3910. This restriction may be a problem if, for example, the client has two or three young children. Most parents think of their funds as though they are held in one family pot, to be used as needed for each child. CUTMA does not allow one pot for all. Furthermore, although a successor may be nominated, if there is a vacancy in the office and the client has failed to nominate a successor custodian, a court proceeding may be needed to appoint one.

Although the burden of a court proceeding is avoided by establishing and maintaining a CUTMA account, lack of court supervision can be a problem because a custodian has practically unlimited powers to expend custodial property for the minor's benefit. Prob C §3914(a). There is no ability, as there is with a trust, to craft investment powers and authorize expenditures only according to guidelines specified by the client.

There may also be some tax disadvantages to use of a custodial account if the donor also serves as custodian. See chap 3. If a donor dies while serving as custodian, the value of the transferred property may be included in his or her gross estate for federal estate tax purposes under IRC §§2036, 2038. Probate Code §3914(d), which allows the donor to reserve all distributive powers to the probate court, may well eliminate the potential estate tax problems of a donor-custodian. However, that code section also imposes restrictions on use of the funds until termination of the account, absent a court order. The tax disadvantages may also be avoided by naming a nonrelative as custodian, although the trade-off is loss of control over the account. For further discussion of use of CUTMA accounts, see chap 4.

Another tax disadvantage of a CUTMA account is that the "kiddie tax," which taxes the child's net unearned income over a certain amount at the parents' marginal income tax rate, applies to a child under age 19 (age 24 in the case of a student) whose earned income does not exceed one-half of the amount of his or her support. IRC §1(g)(1)-(4), 152(c)(3). For discussion of the kiddie tax, see §3.90. Furthermore, CUTMA accounts are treated as the student's assets for financial aid purposes. See 20 USC §1087vv(f).

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§7.43 5. Trust

Although more costly to establish than a CUTMA custodianship, a trust offers the greatest flexibility for management of the minor's estate up to and beyond the age of majority. The primary advantage of holding a minor's estate in a trust is that the donor can restrict use or distribution of the gift. The terms of the trust may require that a trustee continue to hold the gift for the minor until a specified age, or may provide for distributions to be staggered throughout the minor's life. The trustee may have broad discretion to use the funds for any purpose, or may be limited to a specific use, such as college education.

A trust also offers the flexibility to establish a separate-share trust for each child, or to provide for a "family pot"-style trust. As the name suggests, a pot trust is a single trust created for the benefit of all the children. The trustee has discretion to distribute income and principal among the children in accordance with certain standards, usually without any requirement to equalize distributions. The trust terminates at a specified time, ordinarily when the oldest or youngest child reaches a certain age.

Under the separate-share arrangement, each child and the issue of each deceased child receive an equal portion of the trust. Each share is administered as a separate trust. The terms of the trust with respect to distributions and termination can be tailored to meet the needs of the individual beneficiary.

A properly funded and managed trust operates privately, and thereby avoids the costs associated with court supervision. However, lack of court supervision may be a disadvantage if the trustee fails to manage the assets of the trust appropriately. For further discussion of trusts when there are minor children, see chap 4.

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§7.44 6. Guardianship of the Estate

When no other provisions have been made, a guardianship of the estate may be unavoidable. On petition of any interested party, the court may appoint a guardian to manage the minor's estate. Prob C §1510. A guardianship offers protections for the minor's estate, including court supervision of the guardian's actions, the requirement of filing periodic accounts, restrictions on how funds may be spent, and the requirement of a bond. See Prob C §§1513.2 (annual status report), 2450-2574 (management powers), 2620-2628 (accounts), 2320-2335 (bond).

The disadvantages of a guardianship include the costs associated with ongoing court supervision and restrictions on access to funds. When a parent is alive, the parent has the duty to support his or her minor children. Fam C §§3900, 3901. Consequently, a guardian of the estate may not use the minor's funds to support the minor when a parent is alive, without court permission. Prob C §2422. If no parent is alive, the guardian may use income of the estate to provide support, maintenance, and education for the minor and, if the income is insufficient, sell estate personal property without court authorization; a sale of real property will require prior court approval and court confirmation of sale. Prob C §§2420, 2543(b). Finally, and perhaps most importantly, the guardianship terminates when the minor turns 18, and the entire estate must be distributed at that time regardless of the size of the estate or the new adult's level of maturity. Prob C §1600.

If the minor's estate consists entirely of cash, an existing formal guardianship of the estate may be terminated and a substitute method of safeguarding the estate may be approved by court order. Prob C §3412. As noted in §7.37, the funds may be paid to a custodial parent if they do not exceed $5000. Alternatively, the funds may be paid over to a custodian under the California Uniform Transfers to Minors Act (CUTMA) or placed in a blocked account. See §§7.39-7.40.

For thorough coverage of guardianships of the estate, see California Guardianship Practice (Cal CEB Annual).

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C. Other Planning Possibilities

§7.45 1. IRC §529 College Savings Accounts

Internal Revenue Code §529 authorizes creation of state-sponsored investment plans for educational expenses. Under IRC §529, states may establish two types of qualified tuition programs: Prepaid Tuition Plan programs and College Savings Account programs. California currently offers only a College Savings Account program, known as the Golden State ScholarShare Savings Trust. See Ed C §§69980-69990 and related tax provisions in Rev & T C §§17140-17140.3. Comprehensive information about the ScholarShare Program is available at http://www.scholarshare.com.

For fuller discussion of 529 plans, see California Estate Planning, chap 21A (Cal CEB 2002).

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§7.46 a. Basic Concepts

Any person may contribute after-tax dollars to a state-sponsored College Savings Account for a designated beneficiary's qualified educational expenses at an eligible educational institution. Qualified expenses may include tuition, fees, books, supplies, and in some circumstances, room and board. IRC §529(e)(3). In 2009 and 2010, they may include purchase of computer technology or equipment, including internet access. IRC §529(e)(3)(A)(iii). There are no income restrictions on the individual contributors. All contributions must be in cash and cannot exceed the amount necessary to provide for the beneficiary's qualified higher education expenses. IRC §529(b)(2), (6). The donor to a 529 plan account remains the owner of the funds and retains control over the account, including the ability to change the named beneficiary (see IRC §529(e)(1)), to withdraw funds from the account (subject to a penalty if used for other than educational purposes), to transfer ownership of the account, and to name a contingent account holder. IRC §529(c)(3)(C). Contributions to a College Savings Account are excluded from the account owner's gross estate, despite the owner's retained control under traditional estate tax principles. IRC §529(c)(4)(A).

The designated beneficiary is ordinarily the student (or future student) for whom the 529 plan is intended to provide benefits. The beneficiary need not be related to the contributor. IRC §529(b)(1). There appear to be no age limits on when the funds must be used. See IRS Publication 970, Tax Benefits for Education. If the 529 College Savings Account is established by a custodian under CUTMA, ownership of the account will automatically revert to the beneficiary when he or she reaches legal age.

For purposes of a 529 plan, an eligible educational institution is an institution described in 20 USC §1088 that is eligible to participate in a student aid program administered by the Department of Education under the Higher Education Act of 1965. IRC §529(e)(5). In general, the term includes colleges, universities, vocational schools, and other postsecondary educational institutions. A current list of eligible educational institutions can be found on the Department of Education website at http://www.ope.ed.gov/accreditation and at http://www.scholarshare.com. The funds do not have to be used exclusively for California colleges.

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§7.47 b. Planning Issues

A 529 plan is an attractive estate planning device for a number of reasons. For the donor, gifts to qualified tuition programs qualify for the annual gift tax exclusion (even though they would otherwise fail as gifts of future interests and even though the donor retains control over the 529 account). IRC §529(c)(2). When used to pay qualified educational expenses, the income on the account grows tax-free for both state and federal purposes and is excluded from the distributee-beneficiary's gross income. IRC §529(c)(1), (3)(B); Rev & T C §17140. Another significant benefit for the beneficiary is that the 529 plan is not considered an asset of a student for purposes of federal student financial aid. 20 USC §1087vv(f).

WARNING: Parties who are considering a 529 account should be advised to consult a tax expert, because there are complex tax implications that are not obvious. See chap 3. It is also possible that changes in state law will adversely affect the benefits.

NOTE: Gifts under IRC §529 are different from gifts of tuition made on behalf of an individual *directly* to the educational institution under IRC §2503(e). These direct payments are subject to the unlimited gift (and generation-skipping) tax exclusion for tuition payments. IRC §§2503(e), 2611(b).

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§7.48 2. Coverdell Education Savings Accounts

Internal Revenue Code §530 Coverdell Education Savings Accounts (Coverdell ESAs), previously known as Education IRAs, offer an additional opportunity to save for educational expenses. Coverdell accounts were established to allow parents to set aside funds in an IRA-type account to be used for educational purposes. As with an IRC §529 plan, contributions must be made in cash; the earnings and distributions are tax exempt when used for educational purposes. See IRC §530.

The primary advantage of this type of account over an IRC §529 plan is that the funds can be used for private elementary or secondary education in addition to post-secondary education expenses. IRC §530(b)(2). However, use of this type of account is phased out for taxpayers with modified adjusted gross income ranging from $95,000 to $110,000 for single taxpayers and $190,000 to $220,000 for married taxpayers, and the aggregate amount that can be contributed annually per beneficiary is limited to $2000. IRC §530(b)(1)(A), (c). In contrast to an IRC §529 plan, funds cannot be reacquired by the contributor. IRC §530(b)(1). In addition, funds cannot be contributed after the beneficiary reaches age 18, and the funds in the account must be used by the time the beneficiary reaches the age of 30 (unless the beneficiary has special needs). IRC §530(b)(1)(A), (E).

A Coverdell ESA will not be considered an asset of a student for purposes of federal student financial aid. 20 USC §1087vv(f).

NOTE: A contributor may make contributions to Coverdell ESAs and College Savings Accounts in the same year with no penalty. IRC §4973(e). If distributions are made from both types of accounts for the same beneficiary in the same year, the beneficiary is required to allocate qualified higher education expenses among the distributions in order to determine the amount excludable from the beneficiary's federal income tax. IRC §529(c)(3)(B)(vi).

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§7.49 3. Special Needs Trusts

A special needs trust (SNT) may be appropriate for a disabled child whose disability will last into adulthood and who is expected to require assistance throughout his or her lifetime. An SNT is an irrevocable trust that can be created as an inter vivos or testamentary trust. Although public benefits may provide for basic care, public benefits alone will provide for a meager existence. Funds set aside in an SNT can be used for "extras" such as physical therapy, in-home care, recreational opportunities, or travel without jeopardizing the child's eligibility for public benefits.

PRACTICE TIP: Special needs trusts require great attention to the labyrinthine rules and regulations that govern public benefits. The special needs trustee should engage the services of an attorney who specializes in this complex area of law to avoid running afoul of regulations and risking loss of public benefits.

For discussion of SNTs, see chap 6.

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IV. ADVANCE HEALTH CARE DIRECTIVES

§7.50 A. Importance of Advance Directive

No estate planning consultation is complete without a discussion of how health care decisions will be made if the client becomes incapacitated. The attorney must make sure that the client understands the potential consequences of not signing an advance health care directive (AHCD). Lack of an AHCD could subject the client to a conservatorship proceeding seeking court authorization to make critical health decisions for the client in the event of incapacity. Such proceedings often offend the client's dignity, and are expensive and time-consuming.

In the absence of knowledge to the contrary, a physician and surgeon or other health care provider may presume that an AHCD is valid. Prob C §4676(b).

NOTE: Despite the importance of having an advance directive, no health care provider can require a patient to have one by conditioning treatment on the execution of an AHCD. Prob C §4677.

This chapter provides only an introduction to AHCDs. For fuller discussion, including sample form provisions, see California Powers of Attorney and Health Care Directives, chaps 7-8 (Cal CEB 2008).

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§7.51 B. Advance Health Care Directives Under Health Care Decisions Law

The Health Care Decisions Law (Prob C §§4600-4806) governs advance health care directives (AHCDs) in California. An AHCD may consist of individual health care instructions, a power of attorney for health care (PAHC) naming an agent to make health care decisions for the principal in the event of incapacity, or both. Prob C §§4605, 4629. The term "health care decisions" is broadly defined to encompass the selection and discharge of health care providers and the approval or refusal of medical tests, treatments, and medications, as well as directions to provide, withhold, or withdraw artificial feeding and hydration, cardiopulmonary resuscitation, and all other forms of health care. Prob C §4617.

The emphasis in the Health Care Decisions Law is on honoring the patient's wishes. Consistent with this emphasis is that, in the absence of knowledge to the contrary, a physician and surgeon or other health care provider may presume that an AHCD is valid. Prob C §4676(b).

A PAHC is durable unless the principal provides otherwise. See Prob C §4682. This means that the document is effective even if the client becomes incapacitated; in other words, it "endures" the client's incapacity. An AHCD may be created using an optional statutory form (Prob C §4701) or another writing, such as an attorney-drafted form. See Prob C §4700. Probate Code §§4670-4690 set out the required contents and procedures for creation and revocation of an AHCD.

NOTE: All valid powers of attorney for health care and other types of advance health care directives that were signed before July 1, 2000, are protected under the Health Care Decisions Law and need not be redone simply because of its operative date of July 1, 2000. See Prob C §4665.

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C. Agent Under Power of Attorney for Health Care

1. Authority to Make Health Care Decisions

§7.52 a. Scope of Authority

The authority of an agent under a power of attorney for health care (PAHC) becomes effective only on a determination that the principal lacks capacity, unless the PAHC provides otherwise. Prob C §4682. The agent may make health care decisions for the principal to the same extent that the principal could if the principal had capacity. Prob C §4683(a). This specifically includes decisions to provide, withhold, or withdraw artificial nutrition and hydration. See Prob C §4617. The agent does not have the power to commit the principal to a mental health treatment facility or to authorize convulsive treatment, psychosurgery, sterilization, or abortion. Prob C §4652.

The agent has a duty to act consistently with the principal's desires as expressed in the individual health care instructions, if any, or otherwise made known to the agent at any time. If the principal's desires are not known, the agent must act in the principal's best interests, taking into consideration the principal's personal values. Prob C §4684. It is helpful, therefore, for the PAHC to include statements about the principal's values relevant to health care decisions, particularly decisions to withhold or withdraw treatment. See §§7.57-7.59.

If the principal objects to any treatment decision and understands the consequences of making those objections, the action cannot be taken over the principal's objections. Prob C §4689.

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§7.53 b. Health Care Decisions by Someone Other Than Agent

The Health Care Decisions Law allows a patient to designate a surrogate, other than the patient's agent or conservator, to make health care decisions for the patient for a limited time. Prob C §§4643, 4711. Unless the patient designates a shorter period, a surrogacy designation is effective only during the course of treatment or illness or during the stay in the health care institution when the designation is made, or for 60 days, whichever period is shorter. Prob C §4711(b). The designation of a surrogate must be promptly recorded in the patient's health care record. Prob C §4711(a). If the patient has designated an agent under a PAHC, the surrogate has priority over the agent only for the period specified in Prob C §4711(b). Prob C §4711(d).

In nonemergency situations, unless a surrogate has priority, someone other than the agent may make health care decisions, but only if the agent or any successor agent under the PAHC is not reasonably available and willing to make the decisions. See Prob C §4685. For definition of "reasonably available," see Prob C §4635.

When a conservatorship exists *and* a PAHC has been executed, the agent has priority over the conservator of the person in making health care decisions. Prob C §4685. The court has the discretion, however, on a showing of good cause, to issue a temporary order prescribing the principal's health care. Prob C §4770.

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§7.54 2. Right to Receive Information

Unless limited by the AHCD, the agent has the right to receive information about the principal's medical condition from all treating health care providers, and is authorized to review the principal's medical records and consent to their disclosure. Prob C §4678.

If the principal becomes wholly or partially incapacitated, or if there is doubt about the principal's capacity, the agent may obtain the information necessary to perform an agent's duties from a person previously designated by the principal for this purpose, the principal's spouse, physician, supervising health care provider, attorney, family member, government agencies, and specified others. These persons must disclose information that the agent needs to carry out his or her duties; this does not constitute a waiver of any privilege. Prob C §4690.

PRACTICE TIP: It is probably helpful to include in the AHCD a provision identifying the agent as a "personal representative" for purposes of the Health Insurance Portability and Accountability Act of 1996 (HIPAA) (Pub L 104-191, 110 Stat 1936) (42 USC §§1320d-1320d-9)), with the right to have the principal's medical information disclosed. For discussion of the privacy rules of HIPAA, see California Powers of Attorney and Health Care Directives, chap 7 (Cal CEB 2008).

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3. Postmortem Acts

§7.55 a. Authority to Dispose of Remains and Authorize an Autopsy

Unless a PAHC provides otherwise, the advance health care directive gives the agent the power to dispose of the principal's remains and to authorize an autopsy. Prob C §4683(b)(2)-(3). In addition, the agent may authorize the release of the principal's records to the extent necessary for the agent to fulfill his or her duties. Prob C §4683(b)(4).

The agent has priority to direct the disposition of the principal's remains, even over a competent surviving spouse, adult children, or other relatives. Health & S C §7100(a). To minimize confusion and conflict after death, and to aid the agent in carrying out his or her responsibilities, the client should clearly state in the AHCD his or her wishes regarding disposition of remains, make family members aware of these wishes, and provide the mortuary or cremation society with the same specific instructions as are in the AHCD. If the client's will contains funeral and burial instructions, the attorney should make sure that they do not conflict with the AHCD provisions and that the documents contain the same priority of persons with responsibility for carrying out the client's postmortem instructions. If the client prefers to be cremated, it is especially helpful for the client to sign a cremation authorization for the mortuary or cremation society.

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§7.55A b. Authority to Make Gifts Under the California Uniform Anatomical Gift Act

Under the California Uniform Anatomical Gift Act (Health & S C §§7150-7150.40), the agent can make an anatomical gift of all or part of the principal's body only if the PAHC expressly permits the agent to do so. Health & S C §7150.15(b).

NOTE: The current revised Uniform Anatomical Gift Act (UAGA) replaced the former version of the UAGA (former Health & S C §§7150-7156.5), effective January 1, 2008. As of this writing, Prob C §4683(b)(1), which gives the agent authority to make an anatomical gift under the UAGA subject only to limitations in the PAHC, has not been amended to reflect the requirement for express permission in the PAHC under Health & S C §7150.15(b).

While the donor is living, the agent may make an anatomical gift by completing a donor card or by authorizing that the donor be included on a donor registry, in the manner described in Health & S C §7150.20(b). For other ways for a donor to make an anatomical gift (under the provisions of Health & S C §7150(a)), refuse to make an anatomical gift, or revoke a previous gift, and for requirements that the DMV collect donor information, see §7.63. After the donor is deceased, unless the decedent has left an unrevoked refusal to make an anatomical gift, specified persons may authorize a gift, with highest priority going to the decedent's agent under a PAHC that expressly permits the agent to make an anatomical gift. Health & S C §7150.40. The agent cannot make a gift if the donor has documented the refusal to make a gift (Health & S C §7150.30) nor can the agent amend or revoke an anatomical gift made by the donor (Health & S C §7150.35(a)). A revocation of a previous gift is not a refusal within the meaning of the statute, and so does not bar the agent from making a gift. Health & S C §7150.35(c).

A principal who gives an agent the power to make an anatomical gift should also state any specific wishes regarding organ donation (such as purpose or recipient) in the AHCD. Because time is critical in the organ donation process, it is essential for the agent to be aware of those wishes. A client who wishes to make anatomical gifts should consider the forms discussed in §7.63 in addition to the statement in the AHCD.

For further discussion of the UAGA, anatomical gifts, and disposal of remains, see California Elder Law Resources, Benefits, and Planning: An Advocate's Guide, chap 4 (Cal CEB 2003).

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§7.56 4. Compensation

The statute makes no specific provision for compensation or reimbursement of agents under a PAHC. If the principal wants the agent to be paid or reimbursed for expenses, it is best to have a provision in the PAHC specifically authorizing this.

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D. Provisions in Advance Health Care Directives

§7.57 1. Specific Statements of Wishes

A client preparing an AHCD should consider including specific statements of his or her desires regarding health care. These can be included in an attorney-drafted form or added on an attachment to the California Medical Association form or a similar preprinted form. It is particularly important that each individual tailor the AHCD to his or her own personal philosophy about the potential loss of capacity in the future. Some examples are discussed in §§7.58-7.59.

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§7.58 a. Withholding or Withdrawing Medical Treatment

An AHCD may give the agent authority to withhold consent to, or to direct the withdrawal of, any form of medical treatment, including life-sustaining treatment (Prob C §§4650(a), 4653) in order "to permit the natural process of dying" (Prob C §4653). See Prob C §4617(c). The attorney should discuss the client's wishes about life-sustaining treatment to establish the nature and extent of the power to be granted and the circumstances in which those wishes will be honored. If a client wishes to permit an agent to withhold or withdraw life-sustaining treatment in certain situations, it is important to ask whether he or she wishes to include artificially administered nutrition and hydration.

PRACTICE TIP: Several advance directive forms in circulation inquire in great detail about a client's wishes in five or six common illness scenarios. These forms have grids allowing the client to give responses along a spectrum ranging from "I want" to "I would never want." Certain clients find these forms useful, while others find them so daunting that they fail to execute any advance directive. Some physicians have indicated that such forms offer little more guidance than does a less complicated basic AHCD. The attorney should be guided by the client's preference.

For discussion of medical aspects of end-of-life decisions, see California Powers of Attorney and Health Care Directives, chap 8 (Cal CEB 2008).

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§7.59 b. Other Specific Wishes

An AHCD can direct that if the principal develops Alzheimer's disease, he or she would want noninvasive life-prolonging treatments, such as artificial nutrition and fluids, to be continued only as long as he or she can meaningfully interact with family and is physically independent, and does not want intrusive treatments such as CPR or kidney dialysis.

Many Alzheimer's clients participate in clinical research trials after they have been diagnosed with the disease. However, as the disease progresses, the individual loses the ability to give legally effective informed consent. An individual who wants to authorize future participation in a wide range of research should include a directive empowering the agent to give consent to such participation according to the principal's guidelines.

For many clients, religion will be the basis of instructions given to an agent. Some religions, such as Jehovah's Witnesses and Christian Science, have particular concerns in the areas of health care treatment. Instructions in an AHCD can address such issues as refusing blood transfusions, life-sustaining treatment, or any medical treatment on the basis of religious belief.

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§7.60 2. Limiting Court Enforcement of Agent's Duties

Any interested person may petition the court for specified purposes relating to enforcement of an AHCD, including determination of whether an agent's proposed acts are consistent with the principal's expressed wishes or, if the principal's wishes are unknown or unclear, are in the principal's best interest. Prob C §§4765, 4766. A principal may, however, if the AHCD meets certain execution requirements, expressly eliminate the authority of anyone (except for the conservator of the person or the agent) to file a petition for any one or more of those purposes. Prob C §4753(a)-(b).

NOTE: The AHCD cannot eliminate the authority of the conservator of the person to petition the court to (1) determine whether an AHCD is in effect or has terminated; or (2) declare the agent's authority terminated on determination that (a) the agent authorized an illegal act, or failed to act in a manner consistent with the patient's desires, or acted contrary to the patient's best interest, and (b) the patient lacks capacity to execute or revoke an advance directive. Prob C §§4753(b)(1), 4766(b), (d). The AHCD cannot eliminate the agent's authority to petition the court to determine (1) whether the PAHC is in effect or has terminated; or (2) whether the agent's proposed acts are consistent with the principal's known wishes, or, if the wishes are not known, are in the best principal's best interests. Prob C §§4753(b)(2), 4766(b)-(c).

In light of the Terri Schiavo case, some attorneys have suggested that this limiting power could be used to prevent the involvement of strangers in a client's health care. Great care should be taken, however, in considering the limitation of court access. Limiting court access reduces the safeguards that protect the patient from abuse by the agent and could block avenues available to persons acting in good faith who question an agent's actions. Thus, it may be wisest to at least retain the authority for someone like a court investigator or public guardian to petition the court.

If, however, the agent is likely to encounter hostility and interference from a particular individual authorized to petition under Prob C §4765, the principal might seriously consider eliminating that individual's power to seek court review. Alternatively, it may be preferable to nominate an independent person to act as conservator if the need arises, which minimizes the risk of court involvement while preserving some protection, or to include in the AHCD contingency restrictions on the right to petition.

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§7.61 V. HEALTH CARE SURROGATES

The Health Care Decisions Law allows for the written or oral designation of a surrogate to make health care decisions for the principal. Prob C §4711. An oral designation of a surrogate must be promptly recorded in the patient's health care record and, unless the patient specifies a shorter period, the surrogate designation is effective only during the course of treatment or illness, or during the stay in the health care institution when the designation is made, or for 60 days, whichever period is shorter. Prob C §4711. The surrogate chosen must make health care decisions according to the patient's instructions or wishes, if known, or in the patient's best interest as determined by the patient's personal values if the patient's wishes are not known. Prob C §4714.

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VI. DOCUMENTS RELATED TO ADVANCE HEALTH CARE DIRECTIVES

§7.62 A. Request Regarding Resuscitative Measures

A "request regarding resuscitative measures" is a written document directing a health care provider regarding resuscitative measures. Prob C §4780(a)(1). It must be signed by (1) the individual or a legally recognized surrogate health care decisionmaker, and (2) a physician. Prob C §4780(a)(1). A request includes one or both of the following (Prob C §4780(a)(2)):

- A prehospital "do not resuscitate" (DNR) form as developed by the state Emergency Medical Services (EMS) Authority or other substantially similar form;
- A Physician Orders for Life Sustaining Treatment (POLST) form, as approved by the EMS Authority.

A request may also be evidenced by a medallion engraved with "do not resuscitate" or "DNR," a patient identification number, and a 24-hour toll-free telephone number, issued under an agreement with the EMS Authority. Prob C §4780(e).

The POLST form is a physician order form that is signed by the physician after filling out the form in consultation with the patient. A POLST is authorized at Prob C §§4780, 4781.2. If an instruction in the POLST directly conflicts with the person's AHCD, then the later-executed document's instruction prevails. Prob C §4781.4.

Health care providers may rely on a request if it meets the statutory requirements. Prob C §4782. Most emergency medical services agencies honor the Prehospital Do Not Resuscitate (DNR) Form issued jointly by the California Medical Association (CMA) and the California Emergency Services Authority, or an approved bracelet or medallion. The form is available from the CMA at http://www.cmanet.org/bookstore and from some local health care agencies. A DNR medallion may be obtained from the Medic Alert Foundation at (888) 633-4298; http://www.medicalert.org. Unless the patient wears a medallion at all times, a signed form should be conspicuously posted at the patient's residence so that it is immediately available if emergency personnel are called. Family and friends should know where it is posted and where the original is kept.

PRACTICE TIP: If the client feels strongly about not being resuscitated while suffering from a terminal condition or in a persistent vegetative state, the cautious attorney should include a DNR provision in the client's AHCD, as well as having the client and physician execute a DNR order to be placed in the patient's medical records.

NOTE: Under Prob C §4785, the provisions of Prob C §§4780-4784 apply regardless of whether the individual executing a request regarding resuscitative measures is within or outside a hospital or other health care institution.

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§7.63 B. Anatomical Gifts

Organ and tissue donation should be discussed with each client as a relevant issue in end-of-life planning. It might be helpful for clients to be made aware that one person can donate tissue (bone, skin, bone marrow, corneas, and heart valves) as well as up to eight organs (heart, liver, pancreas, kidney, lungs, and small intestine). Advanced age is usually not a barrier to donations, particularly corneas and skin tissue.

Many clients would be willing to let their organs and tissue benefit others, but they often fail to make their intent known. By including such provisions in the AHCD document there is greater likelihood of the client's donation wishes being honored, as these wishes are likely to be noted on the client's medical chart.

In addition, California's Uniform Anatomical Gift Act (Health & S C §§7150-7150.40), which is intended to make the donation process simple in order to encourage donation, allows the donor to make an anatomical gift in one of several ways (Health & S C §7150.20(a)(1)-(4)):

- By a statement or symbol printed on the donor's driver's license or identification card and included on a donor database registry;
- Through the Donate Life California Organ and Tissue Donor Registry website (http://www.donatelifecalifornia.org);
- By will; or
- During a terminal illness or injury, by any form of communication that clearly expresses the donor's wishes, addressed to at least two adults—at least one of whom is a disinterested witness—who memorialize the communication in a signed, dated writing.

For discussion of the authority of an agent under a durable power of attorney to make anatomical gifts, see §7.55A.

The DMV is required to collect donor information on all driver's license applications and electronically transmit it to Donate Life California, and to print the donor designation on the donor's driver's license or identification card. Veh C §12811(b)(4)-(5).

By registering to be an organ and tissue donor on the Donate Life California website, prospective donors have the option of sending a notification form to inform family members of their decision to be a donor. A client who wishes to withdraw or amend a previous consent to donation may also do so on the Donate Life California website.

If the client wishes to donate his or her body for research, it is essential to have the client sign up directly with the particular medical school in question. The client may also register with the Living Bank (http://www.livingbank.org) or the California Transplant Donor Network (http://www.ctdn.org/).

A person may, in a manner prescribed by statute, refuse to make an anatomical gift, in which case no gift will be made (Health & S C §§7150.30, 7150.40(a)), or may revoke a previously expressed intention to make an anatomical gift (Health & S C §7150.25). Note however that a *revocation* of a previous gift is not a *refusal* within the meaning of the statute and that specified individuals ranging in priority from an agent under a power of attorney for health care all the way down to a coroner or hospital administrator may authorize a post-death anatomical gift unless the decedent has expressly refused donation. Health & S C §7150.40. Thus, clients with strong feeling about donation, either for or against, must be clear in their instructions and must adhere to the statute in order to ensure that their wishes are carried out.

For detailed discussion of the UAGA and anatomical gifts, see California Elder Law Resources, Benefits, and Planning: An Advocate's Guide, chap 4 (Cal CEB 2003).

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§7.64 VII. NOMINATION OF CONSERVATOR OF THE PERSON

A conservatorship is a protective court proceeding. In a conservatorship of the person, a court-appointed fiduciary, the conservator, manages the personal care of a person who cannot properly provide for his or her personal needs for physical health, medical care, food, clothing, or shelter. See Prob C §1801(a). The conservator of the person has the "care, custody, and control of" the conservatee. Prob C §2351(a). The conservator of the person must decide where the conservatee will live, how meals, clothing, and entertainment will be provided, what daily routines will be followed, and similar matters. A high degree of personal supervision may be required.

Selection of the conservator is always in the sole discretion of the court, which must be guided by what is in the best interests of the conservatee. Prob C §1812. That said, when the court appoints a conservator, it must give priority to the person nominated by the proposed conservatee, provided the nomination was made at a time when the proposed conservatee had the capacity to form an intelligent preference, unless the court finds that appointment of that nominee is not in the proposed conservatee's best interests. Prob C §1810. The only formal requirements are that the nomination be in writing and signed. Prob C §1810. The nomination of a conservator of the estate may be included in a power of attorney for financial management, in a written advance health care directive, or in a separate writing. Prob C §1810.

In creating an estate plan, an important reason for including an advance health care directive naming an agent is to avoid the necessity of a court-appointed conservator of the person. However, there may be circumstances in which only a conservator of the person can take certain actions with respect to the client's personal needs. Therefore, an advance nomination of the person who the client would wish to serve as conservator is a planning precaution that is recommended. The same person may be appointed the agent and nominated as the conservator of the person.

NOTE: If one person serves as the agent and a different person is appointed as conservator of the person, the agent under a power of attorney for health care has priority over the conservator of the person in making health care decisions. Prob C §4685.

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8

Gathering Client Information

Catherine Raye-Wong

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Source: Estate Planning/Complete Plans for Small and Mid-Size Estates/8 Gathering Client Information/§8.1 I. PRELIMINARY CONSIDERATIONS

§8.1 I. PRELIMINARY CONSIDERATIONS

To properly develop an estate plan for a client, the attorney must first gather all pertinent information, most of which is obtained directly from the client. Clients are often intimidated by this information-gathering process and will need gentle prodding to provide complete documentation. Without complete information, however, the attorney will find it difficult to design a proper plan.

The client's assets must be identified and given an estimated fair market value. Providing the client with a questionnaire to gather the information in advance will give the client an idea of the matters to be discussed at the first meeting. This gives the client time to contemplate answers to difficult questions, such as who will handle financial matters and health care decisions during incapacity, and who, at the client's death, will inherit and who will serve as guardian for minor children.

Very organized clients can come well prepared for the first meeting, bringing with them complete documentation, which may greatly reduce the attorney fee because it saves the attorney considerable time. Many clients, however, become overwhelmed when faced with a lengthy questionnaire, some to the point that they will cancel their appointment. Consequently, some attorneys prefer not to use a questionnaire and instead send the client a list of documents that they should bring with them to the meeting. The attorney then conducts the first interview with the documents in hand.

PRACTICE TIP: Some attorneys make an intake form available to prospective new clients by mail or on the law firm's website, but it is not advisable to require its completion before the first meeting with the attorney because the client may not have all the necessary information; rather, the form can be completed with the attorney's assistance at the first meeting. The attorney should include an instruction to this effect in the questionnaire or message that accompanies the form. For a sample client questionnaire, see §8.10.

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§8.2 A. Determining Title to Assets

Determining title to assets is crucial to implementing and carrying out the plan. Although the client may believe he or she knows how title is held, the attorney should always confirm the information by obtaining a copy of the title document(s). If the client has been single for a long time, or never married, title to assets is less likely to be confused, unless the client added the name of a parent, sibling, or friend to an account and then forgot about it. If the client is divorced, the attorney should ask to see the final decree, the marital settlement agreement (MSA), and any qualified domestic relations order (QDRO) to check for restrictions that might affect the estate plan, including any orders that impose ongoing obligations regarding deferred compensation and retirement benefits.

Often with contractual agreements, such as life insurance policies, annuities, and IRAs, the client will not remember who the designated beneficiary is, if any was named, or if a contingent beneficiary was named. The attorney should ask the client to get written confirmation of the current named beneficiaries, and also to obtain change-of-beneficiary forms, to update or add primary and contingent beneficiaries.

Clients often cannot locate at least some of the documents pertinent to the estate planning process. At the end of the first meeting, the attorney can make a list of missing documents and make the client responsible for obtaining them, either through further searches or by requesting that the institution that holds the asset or title document provide them.

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§8.3 B. Obtaining Values of Assets

Approximate values for assets normally will suffice for purposes of preparing the plan, so a statement from the brokerage firm may be a month or two old, as long as no major changes have occurred. The same is true for bank accounts. A client's estimation of the value of the residence is usually sufficient, but the attorney should inquire about the basis of the estimate, to be sure that it is realistic. The attorney should also obtain information about when and how the client acquired title to the property, as well as its "cost" or other basis. It is also helpful to know the person who prepares the client's tax returns. Finally, it is important that clients provide information regarding the death benefit value and the cash value of any life insurance policies that they own and control.

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II. SOURCES OF INFORMATION

§8.4 A. Real Property

The attorney should obtain the most recent vesting deed or other document evidencing title to real property, whether a grant deed or quitclaim deed, or, if the property was inherited, the judgment of distribution (final or preliminary), executor's deed, or trustee's deed, together with any other documents affecting title, such as an affidavit of death of joint tenant. The attorney should also ask whether the client has executed any subsequent deeds that changed ownership of the property, such as gift deeds or deeds on sale of part of the property, as well as changes in marital status or other events that might affect title. If the client is one of several owners of real estate, the client's interests may be subject to a buy-sell agreement or cotenancy agreement that restricts the client's ability to dispose of the property. Often, transfers cannot be made without first offering to sell the interests to other property owners.

NOTE: Clients often do not understand—or cannot even locate—their title documents. Frequently clients mistake a deed of trust for a grant deed. The grant deed vests title to the property in the client. The deed of trust is the document that pledges real property to secure a mortgage loan. If a client has a mortgage on his or her property, then a deed of trust was most likely recorded by the lender to provide notice of the lender's lien on the property. The deed of trust does not provide all the information the attorney needs, *e.g.,* the legal description and form of title in which the clients hold the property.

If the client does not have the title document and seems confused about what document is needed, the attorney should obtain the most recent vesting document from the recorder's office or from a title company rather than relying on the client to provide it. Copies of property tax bills are helpful as well to verify assessor parcel numbers (APN); occasionally the APN is not included in older deeds.

Even when title is clearly in the client's sole name, a copy of the deed to the real property is still needed, not only for the legal description, but to confirm the exact manner in which the client took title. Often, for example, a middle name or initial is used, or even a former name. A title company will provide, via fax or email, a copy of the vesting deed, free of charge, as long as the deed or other vesting document does not date back too far.

PRACTICE TIP: It is good practice to establish a relationship with the customer service department of a title company to assist with gathering these important title documents. Some title companies may have an online service available. Generally, however, it is necessary to contact a title company conducting business in the particular county where the real property is located. If the attorney's office is not too far from the county recorder's office where the real property is located, the ideal procedure is to obtain the vesting document directly at the recorder's office.

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Source: Estate Planning/Complete Plans for Small and Mid-Size Estates/8 Gathering Client Information/§8.5 B. Nonretirement Financial Institution Accounts, Investment Accounts, and Stocks

§8.5 B. Nonretirement Financial Institution Accounts, Investment Accounts, and Stocks

The attorney should obtain copies of a recent statement from the client for each cash account, including checking and savings accounts, certificates of deposit, and money market accounts, and for all nonretirement investment accounts (*e.g.,* brokerage accounts, dividend reinvestment accounts, Treasury direct accounts, and mutual funds) to determine values and exact title.

If the client physically holds original stock certificates, the attorney should obtain copies and direct the client to place the originals in a fireproof safe or safe deposit box until transfer documents are complete and can be turned over to the transfer agent to reissue them to the trust.

PRACTICE TIP: With so many spin-offs of stocks during the past decade, clients often forget to mention shares they may have in other companies or in plan shares the company is holding for them. Be sure to ask about these possibilities. Additionally, several insurance companies demutualized and issued stock to their policyholders. Many clients are unaware that they hold stock in the insurance company that issued their life insurance policy, so be sure to ask detailed questions about these assets.

PRACTICE TIP: Stock options require special planning and should not be considered an element of simple estate planning. See chap 5; Estate Planning for Special Assets, chap 10 (Cal CEB 2004).

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Source: Estate Planning/Complete Plans for Small and Mid-Size Estates/8 Gathering Client Information/§8.6 C. Businesses

§8.6 C. Businesses

When the client owns a business, it is important to have a full discussion with the client and his or her business attorney or accountant (or both) regarding the value and structure of the business. Depending on the type of business, the client's interest, and the need for business succession planning, estate planning for a client with a business interest is often too complex for an attorney who is not an estate planning specialist. If, however, it is a small business run by the client or a passive investment in a limited liability company or closely held corporation, the planning might still qualify as "simple." For discussion, see chap 5.

Depending on the nature of the business entity, the client will need the following:

Sole proprietorship:

- An endorsed-filed copy of the most current fictitious business name statement;
- Statements for all business bank accounts;
- A copy of the most recent balance sheet;
- A list of assets;
- A copy of the most recent Schedule C to IRS Form 1040; and
- A list of licenses or permits in the name of the sole proprietorship.

Limited liability company:

- A copy of the operating agreement and an endorsed-filed copy of the articles of organization;
- The most recent company income tax returns, balance sheet, and annual statement;
- Any appraisals available;
- Any buy-sell agreements; and
- A copy of the client's issued share certificate.

Partnership interests:

- A copy of the partnership agreement;
- Any appraisals available or an estimate of the value of the partnership interest;
- Any buy-sell agreement; and
- Contact information for the person who manages the partnership.

NOTE: For partnership interests, it is necessary to know whether the client has a general partnership interest or a limited partnership interest.

Closely held corporation:

- An endorsed-filed copy of the articles of incorporation;
- The most recent corporate income tax returns, balance sheet, and annual statement;
- Any appraisals available;
- Shareholders' agreements (*e.g.,* buy-sell agreements, voting trust agreements); and
- The client's stock certificates with all the legends and restrictions on transfer.

If the client is one of several business or investment owners, the client's interests may be subject to a buy-sell agreement or cotenancy agreement. Most nonpublicly traded business interests, including interests in partnerships, limited liability companies, and corporations, are subject to restrictions on transfer. Some restrictions are imposed by securities laws, particularly in a sale to someone who will not be active in the business. Governing documents or owner agreements, including shareholder agreements, commonly limit transfers that may be made without the consent of some or all of the other owners. Often, transfers cannot be made without first offering to sell the interests to other participants in the business.

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Source: Estate Planning/Complete Plans for Small and Mid-Size Estates/8 Gathering Client Information/§8.7 D. Retirement Assets

§8.7 D. Retirement Assets

There are numerous types of retirement assets. To gather client information on retirement assets, the attorney should be familiar with the types and ask the client specifically, by questionnaire or by interview, whether he or she has any of the following:

- *Individual retirement accounts*. A traditional IRA is a trust or custodial account for the exclusive benefit of an individual or the individual and his or her beneficiaries. IRC §408(a). Typically held by a bank or financial institution, IRAs may be established by the individual's contributions (pre-tax or after-tax as allowed by law on an annual basis) or by rollover of sums received from pension and profit-sharing plans such as an IRC §401(k), §403(b), or §457 plan.
- *Roth IRAs*. Annual contributions to a Roth IRA are limited to the amount that is allowed for a traditional IRA, reduced by the amount of any contributions to a traditional IRA. IRC §408A(c)(2). There is no current income tax deduction for a contribution to a Roth IRA, but qualified distributions from Roth IRAs are not subject to income tax. IRC §408A(d)(1).
- *Simplified employee pension (SEP)*. A simplified employee pension plan, commonly known as a SEP IRA, is a retirement plan designed for small business owners and the self-employed under IRC §408(k). When a SEP IRA plan is established for a small business, the owner and any eligible employees establish their own separate SEP IRAs and employer contributions are made into each eligible employee's SEP IRA. Contribution limitations are determined under qualified plan rules rather than being limited to the lower IRA contribution limits.
- *HR 10 or Keogh plans*. A Keogh plan, sometimes known as an HR 10 plan is a qualified pension plan established by unincorporated owner-employees or "self-employed individuals" as defined in IRC §401(c). Tax-deductible contributions are allowed up to a certain percentage of the individual's income. Keogh plans have higher contribution limits and more administrative requirements than other retirement planning devices available to self-employed individuals.
- *CODA/§401(k) plans.* A 401(k) plan is an employer-sponsored plan that permits participants to contribute part of their compensation, before taxes, to the participant's account in the plan. IRC §401(k). Under normal constructive-receipt tax concepts, the participant's right to receive cash would cause the participant to be deemed to have received the cash and then transferred it to the plan. Under IRC §402(e)(3), however, tax on the contributions and earnings is deferred until they are withdrawn.

In addition, there are numerous other qualified plans available through employment arrangements. See California Estate Planning, chap 21 (Cal CEB 2002).

The attorney should have the client provide copies of the most recent statements for each retirement account. The client should obtain written confirmation of the current beneficiary designations, including primary and contingent designations, for each account. The client should also obtain change of beneficiary forms for each account, along with any instructions that the plan provides regarding acceptable language for beneficiary designations.

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Source: Estate Planning/Complete Plans for Small and Mid-Size Estates/8 Gathering Client Information/§8.8 E. Anticipated Assets

§8.8 E. Anticipated Assets

In addition to gathering information about the client's existing assets, the attorney should ask whether the client anticipates receiving inheritances or gifts, and should determine from whom they are to be received, the type of asset if specific, and the approximate value and date expected. If the client holds any powers of appointment, this issue should be explored with the client. The attorney should also ask whether any major sales or purchases are likely in the near future.

PRACTICE TIP: Most clients are unfamiliar with the term "power of appointment" and consequently will not know whether they hold such a power. The attorney may have to explain what a power of appointment is and ask follow-up questions about the estate plan(s) of the client's parents (or other person from whom the client expects to inherit), for example, to determine whether the client holds such a power. If the client does hold such a power, a copy of the document granting the power must be obtained.

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Source: Estate Planning/Complete Plans for Small and Mid-Size Estates/8 Gathering Client Information/§8.9 F. Other Types of Assets

§8.9 F. Other Types of Assets

There are many other types of assets that a client might own. If there is a written document of some sort that shows how title is held, the attorney should have the client provide a copy. Examples of such assets include:

- Personal vehicles, aircraft, and boats. Have the client provide a copy of the ownership certificate for any vehicle or boat registered with the California Department of Motor Vehicles. Aircraft registrations are typically issued by the Federal Aviation Administration, and some vessels' registrations are issued by the United States Coast Guard.
- Mobilehomes and manufactured homes. Depending on the type of mobilehome it is, it is registered with either the California Department of Motor Vehicles or the California Department of Housing and Community Development. Have the client provide a copy of the ownership certificate.
- Life insurance policies. Have the client provide the death benefit, current value, type of insurance, who is the insured, current beneficiary designation, and policy number. If the beneficiary designation must be updated, have the client obtain a change form from the employer or insurance agent.
- Annuities. Have the client provide the contract, which should include information regarding the insured, the death benefit, current value, and type of annuity. Confirm the current named beneficiary; if the beneficiary designation should be updated, have the client obtain a change form from the company or insurance agent.
- Mineral, oil, and gas interests. These usually involve a recorded document. The attorney should have an estimated value of the investment, a description of the client's interest, the recorded document, and contact information for the person or company who manages the interest.
- Promissory notes and recorded copies of any deeds of trust securing promissory notes.
- Tangible personal property, including household furniture, furnishings, and personal effects. Animals are also tangible personal property. These items rarely have substantial value and few clients will have kept the bill of sale or receipt for payment. Some clients, however, have valuable collections of tangible items of personal property, such as registered or rare animals, jewelry, coins, or art work. It is always important to ask the client about collections. If the value of the collection is greater than $10,000, or if the value of one item is over $3000, the client may have insured it and will have a written inventory and appraisal of the items. See Treas Reg §20.2031-6 on valuation of household and personal effects for estate tax purposes.
- Safe deposit box. The attorney should have on file the box number and location of the safe deposit box, the regular location of the key, and a list of the current contents.

NOTE: The attorney should also ascertain whether any sales or purchases are likely in the near future.

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Source: Estate Planning/Complete Plans for Small and Mid-Size Estates/8 Gathering Client Information/§8.9A G. Online Accounts and Passwords

§8.9A G. Online Accounts and Passwords

Many clients may have accounts for which there is no paper documentation and for which monthly, quarterly, or annual statements are only available online. The attorney should determine whether the client owns any such accounts and obtain current information about them. The client should be advised of the importance of keeping updated information about such accounts and their passwords where the estate planning documents, once signed, will be kept.

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Source: Estate Planning/Complete Plans for Small and Mid-Size Estates/8 Gathering Client Information/§8.10 III. FORM: CLIENT QUESTIONNAIRE

§8.10 III. FORM: CLIENT QUESTIONNAIRE

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8.10-1 Client questionnaire: confidential information sheet

CLIENT QUESTIONNAIRE:
CONFIDENTIAL INFORMATION SHEET

_____ US Citizen
_____ QDT

Date: _____

1. CLIENT AND FAMILY

Name usually used:_____

Telephone: (____) _____ (home)
(____) _____ (work)
(____) _____ (cell)
(____) _____ (spouse/partner's work)

Full name (if other than normally used):_____

Other names used:_____

Signature name:_____

Street address: _____ Apt. number:__

City and zip code: _____ County:_____

Date of birth: _____ Social Security number:_____

Place of birth and citizenship:_____

Period of residence in California: _____

Occupation:_____

Employer:_____

State of health:_____

Veteran? _____ I.D. number:_____
Branch of service: _____ Discharge date:_____

___ Location of discharge papers: _____

___ Current VA benefits received: _____

___ If medical, location of facility: _____

Full name of spouse/domestic partner:_____

NOTE: Further references to "partner" in the rest of this form are to domestic partner.

Other names used:_____

Signature name:_____

Date of birth: _____ Social Security number:_____

Place of birth and citizenship:_____

Period of residence in California:_____

Occupation:_____

Employer:_____

State of health:_____

Veteran? _____ I.D. number:_____
Branch of service: _____ Discharge date:_____

___ Location of discharge papers: _____

___ Current VA benefits received: _____

___ If medical, location of facility: _____

Date and place of marriage:_____

Date and place of partnership registration (Registered with state? If yes, please provide copy of registration. Registered with a county?):_____
_____

Periods of out-of-state domicile (dates and places):_____
_____
_____

Do you have a prenuptial, postnuptial, or partnership agreement?
____ Yes ____ No (If so, please provide us with a copy)

Separated and/or in process of terminating marriage/partnership?_____

Date of separation:_____

Any outstanding orders regarding property division? If so, provide copy.

Children of Current Marriage/Partnership
List oldest first; Birth date; Place of birth and citizenship; Marital status and/or name of spouse/partner
_____
_____
_____

If registered domestic partnership:
Have children been adopted by second parent? _____ If so, date?_____

Client's Most Recent Prior Marriage/Partnership
Name of former spouse/partner: _____

Marriage/Partnership ended by: _____ death _____ Dissolution of marriage/
Termination of partnership; In: _____ (year and location)

Children of Prior Marriage/Partnership
List oldest first; Birth date; Place of birth and citizenship; Marital status and/or name of spouse/partner
_____
_____
_____

Existing right from or obligation to former spouse or partner re child?
____ Yes ____ No

Spouse's/Partner's Most Recent Prior Marriage/Partnership
Name of former spouse/partner:_____

Marriage/Partnership ended by: _____ death _____ Dissolution of marriage/
Termination of partnership; In: _____ (year)

Children of Spouse's/Partner's Prior Marriage/Partnership
List oldest first; Birth date; Place of birth and citizenship; Marital status and/or name of spouse
_____
_____
_____

Existing right from or obligation to former spouse or partner re child?
____ Yes ____ No

Please Provide a Copy of Any Marital/Partnership Settlement Agreement, Qualified Domestic Relations Order, or Final Judgment of Dissolution/Termination That Imposes Obligations on You or Contains Decisions Regarding Property Division.

2. ADVISORS

CPA/Accountant(s):_____

Financial Advisor(s):_____

Insurance Agent(s):_____

Business or Other Attorney(s): _____

3. ASSETS

NOTE: Please indicate whether information regarding any of the following assets is only available online.

TYPE OF ASSET	VALUE
Real Property Attach copy of most recent RECORDED GRANT DEED OR TITLE DOCUMENT and copy of TAX BILL for each and copy of any buy-out or co-tenancy agreement. For each property list: Address of property; Co-owners; Acquisition date and purchase price; Type of property (*e.g.,* residential, income); Approximate fair market value; Mortgage.	**Equity**
1. _____	$_____
2. _____	$_____
Notes & Deeds of Trust Attach copy of NOTE and SECURITY AGREEMENT or RECORDED DEED OF TRUST for each note. List: Payer; To whom note is payable; and Terms of note, including original amount, due date, interest, and security.	**Current Balance**
1. _____	$_____
2. _____	$_____
Investment Accounts Attach copy of the most recent MONTHLY OR QUARTERLY STATEMENT for Stock Portfolios, Bonds, Mutual Funds, Dividend Reinvestment Accounts, Certificates of Deposit if in separate account. List: Name of company; Account number; How account is held (*e.g.,* sole ownership, joint tenancy).	**Value**
1. _____	$_____
2. _____	$_____
Stocks in Certificate Form, Stock Options & Bonds Not in an Account If you hold stocks or bonds in certificate form, we will need the ORIGINAL CERTIFICATES in order to transfer to your trust (NOT US Savings Bonds E/EE, H/HH, or I) (Provide OPTIONS CONTRACT and/or STATEMENT) List: Shares or amount; Company name.	**Value**
1. _____	$_____
2. _____	$_____
Savings & Cash Accounts Attach COPY of the most recent statements. List: Name and address of financial institutions; Type of account; Account number; How account is held (*e.g.,* sole ownership, joint, in trust for/pay on death).	**Value**
1. _____	$_____
2. _____	$_____

Client-Owned Business

Sole Proprietorship

Provide copy of filed, current FICTITIOUS BUSINESS NAME STATEMENT, copy of all BUSINESS BANK ACCOUNT STATEMENTS, copy of most recent BALANCE SHEET, copy of SCHEDULE C to FORM 1040, and a list of LICENSES or PERMITS in the name of sole proprietorship.

List: Name of business; Address; Nature of business. **Value**

1. _____ $_____

2. _____ $_____

Limited Partnership

Provide copy of CERTIFICATE and COPY of AGREEMENT, and copy of any BUY-SELL AGREEMENT.

List: Number of units; Name of partnership; General partner; Address of general partner. **Value**

1. _____ $_____

2. _____ $_____

Limited Liability Company

Provide copy of OPERATING AGREEMENT and filed ARTICLES OF INCORPORATION, copy of most recent COMPANY INCOME TAX RETURNS, copy of BALANCE SHEET and ANNUAL STATEMENT, copy of any APPRAISALS, and client's issued SHARE CERTIFICATE.

List: Name of company; Address; Nature of business; Other owners' names & percentage ownership. **Value**

1. _____ $_____

2. _____ $_____

Corporation

Provide copy of filed ARTICLES OF INCORPORATION, BYLAWS, and MINUTE BOOKS; copy of most recent COMPANY INCOME TAX RETURNS; copy of BALANCE SHEET and ANNUAL STATEMENT; copy of any SHAREHOLDERS' AGREEMENTS (*e.g.,* any BUY-SELL AGREEMENTS or VOTING TRUST AGREEMENTS); copy of any APPRAISALS; and client's issued SHARE CERTIFICATES with all legends and restrictions on transfer.

List: Name of corporation; Address. **Value**

1. _____ $_____

2. _____ $_____

Miscellaneous Assets

Tangible Personal Property of Significant Value

(*E.g.,* collections of artworks, animals, jewelry, antiques, coins, rare books, stamps, silver worth more than $10,000, and individual items worth more than $3000.) Indicate approximate fair market value. If item is not entirely owned by you, list the co-owners and their ownership interests in the item. **Value**

1. _____ $_____

2. _____ $_____

Automobiles, Trucks, Trailers, Recreational Vehicles, Boats, Airplanes

List: Model and year; Title as shown on ownership document; Encumbrances. **Value**

1. _____ $_____

2. _____ $_____

Safe Deposit Box

List Number; Location; Contents. **Value of Contents**

1. _____ $_____

2. _____ $_____

SUBTOTAL OF ASSETS $_____

Retirement Assets
IRA accounts, SEP IRAs, KEOGH plans, 401(k) accounts, pensions plans, profit-sharing plans, annuities, deferred compensation plans, Social Security benefits (copy of statement; contact company for CHANGE OF BENEFICIARY FORM if advised by attorney; we will advise you how to fill it out).

List: Custodian of account or company name; Beneficiary/contingent beneficiary; Account number. **Value**

1. _____ $_____

2. _____ $_____

Pension Information for Both Client and Spouse/Partner
List from whom received or to be received and whether spouse/ partner will receive any at client's death.

1. _____

2. _____

Currently Owned Benefits Other Than Retirement Assets Relating to Your Present and/or Former Employment
(*E.g.,* stock purchase plans, stock options, and bonus plans.) Include value of each benefit and name of the death beneficiary, if one has been named. **Value**

1. _____ $_____

2. _____ $_____

Life Insurance
Policies in which client, spouse, or domestic partner is the insured (Note: If policy is through employment, provide copy of fact sheet of policy and contact company for CHANGE OF BENEFICIARY FORM, if advised by attorney; we will advise you how to fill it out.)

List: Name of company; Type (*e.g.,* term, full life); Face value of each policy less borrowed amount; Surrender value; Policy number; Insured; Owner of policy; Beneficiary/Contingent Beneficiary. **Value**

1. _____ $_____

2. _____ $_____

TOTAL $_____

Possible Assets
Expected Inheritances or Gifts?
___ Yes ___ No ___ Uncertain

Beneficial Interest in Trust?

___ Yes ___ No ___ Uncertain

Medical Insurance
List all insurance coverage and supplemental, if applicable.

1. _____

2. _____

Long-Term Care Insurance

List name of company, agent, location of policy; Attach copy of policy.

1. _____

2. _____

4. PERSONAL REPRESENTATIVES

Executor of Will:
(Indicate co-executors on the same line)
1st:_____
2nd:_____
3rd:_____

Guardian of the Person for Minor Children:
(Indicate co-guardians on the same line)
1st:_____
2nd:_____
3rd:_____

Guardian of the Estate for Minor Children:
(Indicate co-guardians on the same line)
1st:_____
2nd:_____
3rd:_____

Trustee(s):
(Indicate co-trustees on the same line)
Self:_____
Self & Spouse/Partner:_____
or Name(s):_____

1st successor:_____
2nd successor:_____
3rd successor:_____

5. DISTRIBUTION OF ASSETS

Household Goods & Personal Property

Specific Gifts of Specific Items of Property

1. Item:_____
Primary:_____
*Contingent (if primary does not survive you):*_____

2. Item:_____
Primary:_____
*Contingent (if primary does not survive you):*_____

Gift of Remaining Personal Belongings

Primary (check one):

To Spouse _____ To Partner _____ Equally to Children _____ Equally to Siblings _____ Equally to (named) Others _____ Other_____

Names:
_____
_____

Contingent (if primary does not survive you; check one):

Then Equally to Children _____ Then Equally to Siblings _____
Then Equally to (named) Others _____ Then to Other _____

Names:

_____
_____

Gifts of Money or Specific Distributions in Trust

Name Item

_____
_____
_____

Gifts of Real Property
Description and address of property:

_____
_____
_____

Subject to liens?: _____ or Free from liens? _____
Free from estate taxes? _____

To whom:_____
If beneficiary is not then living, to:_____

Residue (Balance of the Estate)
Distribute Outright:
To Spouse/Partner _____ Equally to Children _____
Equally to (named) Others _____ Other_____

Names:

_____
_____

Hold in Trust for:
Spouse/Partner _____ Child(ren) _____ Issue (that is, direct descendants) of deceased child(ren) _____ Grandchildren _____
Other(s) _____

Names:

_____
_____

If No Beneficiaries or Issue Survive, Who Inherits?

Names:

_____
_____

If Gifts Held in Trust for Minors:

Distribute in one (1) stage at age: _____
Distribute in two (2) stages at age: _____ and age _____
Distribute in three (3) stages at age: _____, age _____, and age _____

6. BUSINESS INTERESTS

Is There a Business in the Estate?
_____ Yes _____ No

7. DURABLE POWER OF ATTORNEY

Durable Power of Attorney for Financial Management:
Agent:_____
Alternate:_____
With Gifting Power? _____ Yes _____ No
Springing? _____ Yes _____ No

8. ADVANCE HEALTH CARE DIRECTIVE

Agent:

Appointee:_____
1st Alternate: _____ Spouse/Partner alt:_____
2nd Alternate: _____ Spouse/Partner alt:_____

Special Instructions:
For example: Do you wish to be kept alive by machine if in terminal condition or persistent vegetative state? _____ Yes _____ No; Do you wish to be an organ donor? _____ Yes _____ No
_____
_____
_____
_____

9. POSSIBLE CONTESTANTS

Is Anyone Likely to Contest Your Estate Plan? ____ Yes ____ No
Your Health Care Directive Agent? ____ Yes ____ No
If Yes, Who?_____

****

CONFIDENTIAL INFORMATION SHEET—FOR ATTORNEY TO FILL OUT

Client referred by: _____ Fee quoted:_____
Proceed: ____ Yes ____ No ____ Wait

If trust, type of trust:
____ Disclaimer ____ A/B Trust ____ ABC Trust ____ GSTE Trust ____ QTIP ____ QDT ____ Other:
____ Same beneficiaries ____ Different beneficiaries:_____
_____

____ Married Person as Single Client ____ Trust in Will ____ SNT
If married couple:
Would either care if survivor changed the trust? ____ No ____ Yes

Comment: The last section of the confidential information sheet ("For Attorney to Fill Out") should be on a separate page, to be filled out by the attorney and not sent to the client.

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§8.11 IV. THE CLIENT INTERVIEW

The first meeting provides the best opportunity for the attorney to explore the nature and extent of the client's assets and liabilities. If the client has returned a completed questionnaire, it is extremely helpful at this point to go over the entries, item by item, to confirm the information and to elicit additional facts. The attorney can also learn more about the client's family situation, which can be useful when discussing who might be best suited to act as the client's fiduciaries after his or her incapacity or death. In addition to obtaining additional information from the client, the attorney can answer any fee questions that the client has, and deal with any existing or potential concerns.

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§8.12 A. Names

It is important for the attorney to know and identify all names by which the client is known. It is not uncommon for a person to hold assets in different names, *e.g.,* married and unmarried names, unmarried name using mother's maiden name, initials for first names, middle name instead of given first name, and so forth. Often a practitioner will not find out about the client's different names until he or she examines the title documents for a client's assets.

PRACTICE TIP: In the client's estate planning documents, it is important to use one name consistently but include all names the client has used and recite them in the beginning of the document as "also known as." In the event of incapacity or death, the agent under a power of attorney or the executor, respectively, will be able to manage an asset for a client that is titled in a name other than the client's most commonly used name. For trust property, the same form of the trustees' names and the trust name should always be used when assets are transferred to the trust. For example, the trustee should not be called "Jane Doe, Trustee of the Jane Doe Trust," on a savings account and "Jane E. Doe, Trustee of the Jane Doe Trust dated 7/7/01" on a deed.

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§8.13 B. Marital or Partnership Status; Citizenship

The client should be questioned about his or her marital status and, if applicable, the date of marriage and the date of dissolution or legal separation. It is important to know if there is a pending dissolution action in which there has been a judgment regarding property division and, if so, to obtain a copy of the judgment. See *Estate of McDaniel* (2008) 161 CA4th 458, 73 CR3d 907 (at time of death, property division was complete and dissolution action pending, but marriage not terminated; still-legal wife held not a surviving spouse under Prob C §78); *Estate of Garrett* (2008) 159 CA4th 831, 71 CR 3d 864 (abandoned dissolution action had been dismissed; surviving spouse was entitled to priority in obtaining letters of administration for intestate estate).

Often clients do not wish to divulge a prior spouse's name, but it is important to include this information in the will to cut off any potential claims of the prior spouse. The attorney should review the final judgment of dissolution and the client's marital settlement agreement (MSA) to verify whether there are any ongoing financial obligations between the parties. The MSA may require, for example, that the client maintain a life insurance policy for the benefit of his or her former spouse or children. A divorced client's retirement plan may be subject to a Qualified Domestic Relations Order (QDRO) or other order that may limit the client's ability to name a beneficiary of the plan. See IRC §414(p)(1).

If the clients are married or registered domestic partners, the attorney should review any prenuptial and/or postnuptial or domestic partnership agreement of the clients. Compliance with current contractual arrangements with a spouse or domestic partner is of the utmost importance. The practitioner should be aware of the terms and conditions of any such arrangement.

It is imperative to know whether the client is a United States citizen, as it greatly affects the client's estate planning options. If the client and/or the client's spouse is not a citizen, planning should be referred to a specialist familiar with planning for non-United States citizens. See chap 6.

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§8.14 C. Intestate Heirs

Even though the purpose of creating the estate plan, whether by will or trust or other instrument, is to allow the client to name those he or she wishes to receive the assets remaining in the client's estate at death, the attorney should explain what would happen to the client's assets if no estate planning documents were in place at death. A client who is unmarried and has no children may object strongly to the prospective recipients of his or her assets under California's intestacy laws. For example, a client who has no spouse, children, or living parent, but who does have two living siblings, may be close to one and estranged from the other. The client is unlikely to want any assets to go to the sibling with whom he or she has no contact, and may, in fact, not want that sibling to know anything about his or her affairs. Yet the law in California requires that wills of a decedent be lodged with the court (Prob C §8200), which makes them public records. If a probate is required, notice must be sent to intestate heirs (Prob C §8110); this is true even if there is a will and the heirs are not named as beneficiaries in the will. Moreover, at the client's death, each heir, even those who are not beneficiaries of a client's revocable trust, must be given notice of the existence of the trust and the right to receive a copy of the terms of the trust. Prob C §16061.7(b), (g).

If the closest relatives are not going to be named as beneficiaries, the attorney should question the client about whether any of those relatives is likely to challenge the client's will or trust or other estate planning documents. If a close relative is likely to be a problem, the attorney should consider drafting provisions, *e.g.*, in the power of attorney for financial management under Prob C §4503, proscribing the troublesome relative's right to petition the court to challenge the acts of the agent. Similarly, if there is a close relative who has strong religious or other beliefs that conflict with the client's views and who is likely to try to interfere with the client's agent under the advance health care power of attorney, that relative's ability to petition the court can also be proscribed under Prob C §4753(b). If the client desires to limit court access of potential contestants, the special execution requirements of Prob C §§4503(a)(2), (b) and 4753(a)(1)(2), respectively, must be met.

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§8.15 D. Children, Other Dependents, and Pets

The attorney should obtain the names of the client's children, dates of birth, citizenship, current grade in school or occupation, whether married, and whether they have children or grandchildren. The names of spouses and the names and dates of birth of issue should be noted, as well as whether any child or issue is disabled or suffers from any chronic disorders. Deceased children should be identified and the names of any surviving issue of a deceased child should be noted.

If the client has any dependents other than his or her children, the attorney should ascertain the names, legal relationship to the client, if any, the reason for supporting that person, and whether the client wants the support to continue at the client's death.

PRACTICE TIP: The attorney must be open to discussing difficult issues such as prolonged unemployment of dependents, chemical dependency issues, and mental or physical disabilities of family members. These issues are quite common, but often kept secret. It is imperative to provide a supportive, comfortable environment for clients with disabled beneficiaries to properly identify whether they should be referred to an attorney who is a specialist, *e.g.,* in special needs trusts. See chap 6.

Pets (or companion animals, as many people refer to them) play an important part in the lives of many people. Clients who have pets often want to arrange for the financial support and care of their animals in the event they are unable to provide it themselves. The client also may have special wishes regarding what is to happen to the pets in the event of the client's incapacity (*e.g.,* whether they would still wish to keep the pets with them), and may want to specify who ultimately will care for the animals or decide about their placement at the client's death.

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§8.16 E. Fiduciary Information

Usually clients name family members or close friends to act as the fiduciary in various roles, *i.e.,* as the successor trustee, the agent under the financial power of attorney, the executor, and the agent under the durable power of attorney for health care decisions. Sometimes clients, for a variety of reasons, either do not want to name any of these persons or do not have relatives or friends. In this situation, the client may name a private professional fiduciary. The attorney should advise the client to ask whether the person is a member of a professional fiduciary association, carries errors and omission insurance, and serves in court-appointed cases, and should ask how long the fiduciary has been serving the community, and perhaps ask for some references to current clients.

Most banks and trust companies will not act as a fiduciary for a person with a "small," estate, *i.e.,* of less than $1 million. Even if the institution does act, the client should become informed about how long it has been in existence, its fee structure, and whether there are there assets the institution will not handle, *e.g.,* real property.

PRACTICE TIP: If a bank or trust company is to be named, the client should provide the proper legal name of the fiduciary, preferably the name that matches its government identification.

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9

Plan for Unmarried Person Without Children

Jerilyn Paik
Catherine Raye-Wong

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§9.1 I. BEGINNING THE PROCESS

At the initial meeting with the client, the attorney gathers information or reviews the information provided by the client in a questionnaire sent to the client before the meeting. Necessary basic information includes client's date of birth, Social Security number, whether client is single, a registered domestic partner, widowed, or divorced, the names, dates of birth, and location of client's family members, including information about his or her children, if any, and information about client's assets, including, *e.g.,* property agreements.

NOTE: Even if the client is not married, it is important to ascertain whether he or she is a registered domestic partner, because registered domestic partners are treated as spouses under California law (but not under federal law). See Fam C §297.5; chap 4.

The attorney should also ask about potential inheritances and whether the client holds any powers of appointment or whether there are any substantial or significant sales or purchases likely in the near future. Background information about the client's health status will also be important. As the attorney discusses the specifics of the plan, information about beneficiaries, including their ages and families, will become relevant. It is important that the attorney obtain correct spelling of names. If the client does not bring title documents to the initial meeting, the attorney should have the client provide them after the meeting. For a sample questionnaire that can be sent to the client in advance of the first meeting or used by the attorney at that meeting, see chap 8.

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§9.2 A. Determining Title to Assets

To carry out the estate plan, it is imperative to determine how title to assets is held. Often, the client will be unsure about how title is held, but even if the client is certain, the attorney should always confirm the information by obtaining a copy of the title document. If the client has been divorced for a long time, or has never married, title to assets is less likely to be confused, but it is always possible that the client may have changed his or her name or forgotten that another person's name was added to an account at some point. If the client is divorced, the attorney should ask to see the final decree and marital settlement agreement (MSA) to check for provisions that might affect the estate plan, including any ongoing obligations regarding retirement interests.

Even when title is held only by the client, a copy of the deed to real property should be obtained, not only for the legal description, but to confirm the exact manner in which the client took title; often, for example, a middle name or initial is used, or even a former name. A copy of a recent tax bill is helpful for obtaining the most recent assessor parcel number (APN). A title company usually will provide, via fax or e-mail and free of charge, a copy of the recorded vesting deed, as long as the deed or other vesting document does not date back too far.

In the case of life insurance policies, IRAs, and other contractual agreements, clients often cannot recall who the designated beneficiary is, or even if one was named, or whether a contingent beneficiary was named. The attorney should ask the client for written confirmation of the current named primary and contingent beneficiaries, and should have the client obtain change-of-beneficiary forms, so that primary and contingent beneficiaries can be updated or added.

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§9.3 B. Obtaining Values of Assets

For purposes of preparing the estate plan, asset values can usually be approximate, so, for example, a statement from a bank or brokerage firm can be a month or two old if there have been no major changes. A client's estimated value of the residence is usually sufficient, but the attorney should ask what that estimate is based on to make sure that it is realistic. If the client has no idea how much the residence or other real property is worth, the client should contact a realtor to get an idea of what it could be expected to sell for if it were put on the market. The client should also be asked to provide information about when and how title to the property was acquired and the amount of the client's "cost" or other basis in the property. It is also helpful to know the name of the client's tax preparer.

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II. THE HYPOTHETICAL: UNMARRIED PERSON WITHOUT CHILDREN

§9.4 A. The Client: Mary Smith

Assume that the client is Mary Renee Smith, who is 60 years old. She has no children. She works as a dental hygienist and is still contributing to her IRA. Her family members, including her heirs as defined in Prob C §§6400-6455, are an 85-year-old mother, Joan Smith, who is financially secure but is in poor health, and three younger siblings, Andrew Smith, Barbara Smith, and Carl Smith. None of her siblings has financial problems. Andrew is 57, married to Ruth, and the father of two children, Deborah, 24, and Elisabeth, 22. Deborah has always been Mary's favorite among her siblings' children. Mary is closest to her sister Barbara, who is 53, single, and has no children. Carl is 52, married to Janet, and the father of Fred, who is 13 years old. Mary does not like or get along with Carl, but likes his son, Fred. Mary has been divorced for many years and there are no further financial obligations or entitlements resulting from the divorce. (Mary is referred to as "unmarried," versus "single," which refers to never having been married. This distinction is usually helpful to a title company for real property title purposes.) Mary is a U.S. citizen and has lived in California most of her life.

Mary has known her best friend, Cynthia Shipp, since college and still sees her on a regular basis. Cynthia is divorced and has a son, William, who is 23. Mary has known William all his life. Mary is closer to Cynthia and William than she is to either of her brothers. Cynthia is not as well off financially as Andrew or Carl.

The following is a list of her assets:

Title	Date Acquired and Basis (if applicable)	Description of Asset	Approx. Current Value
Mary R. Smith	Purchased 1995 for $225,000	Residence located at 123 Main St., Sacramento, California; Current debt: $100,000	$ 400,000
Mary R. Smith		IRA: Beneficiary unknown	300,000
Mary Smith		Bank Checking account no. 12345	300
Mary Smith J/T w/ Mom		WF Bank Savings account no. 67890	40,000
Mary R. Smith	Opened 1990; $160,000	ABC Brokerage Firm account no. 34567	150,000
Mary Smith	Purchased 2006 for $30,000	Vehicle	20,000
		Furniture and furnishings, and personal effects	nominal
		GROSS ESTATE TOTAL	$910,300

Mary has no life insurance. She cannot recall the beneficiary of her IRA (it may be her former husband) or whether she named a contingent beneficiary. The bank statement has both Mary's name and her mother's name on the savings account.

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§9.5 B. Determining Client's Goals and How to Achieve Them

After gathering Mary Smith's information, the next consideration in formulating the appropriate plan for Mary is to gain a full and clear understanding of her desires and goals. This discussion is the heart of the interview and may take anywhere from 30 minutes to several hours, depending on how knowledgeable Mary is about estate planning possibilities and how much thought she has given to this matter.

It may be difficult for Mary to make decisions, especially about her mother, as her mother's health and needs may change over the years. Because no one can predict the future, it may be helpful to tell Mary that the estate plan should be viewed as the best plan she can devise at the present time and will serve in case something happens to her within the next 3 to 5 years, although it may last her lifetime. The attorney should remind her that it is important for her to review her estate plan periodically and at least every 5 years to ensure that it is up to date in the context of her family, or whenever there are changes in her estate, changes in her desires, or changes in the law. This should help Mary focus on the current situation and events more likely to occur in the near future.

If possible, at the end of the meeting, the attorney will have determined from the interview what Mary wishes to accomplish and which of the following will be needed to accomplish those goals:

- Simple will (without testamentary trust provisions), will with testamentary trust, or revocable trust with pourover will;
- Durable power of attorney for asset management;
- Advance health care directive;
- Beneficiary designations for pay-on-death (pod) accounts and Totten trusts (for bank accounts), transfer-on-death accounts (for securities);
- Joint tenancies;
- Nomination of guardian
- Nomination of conservator;
- CUTMA accounts (California Uniform Transfers to Minors Act under Prob C §§3900-3925).

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C. Formulating the Estate Plan for Asset Management and Distribution

1. Beneficiaries

§9.6 a. Mother

Initially, Mary says that she wants to "keep things simple" because she "doesn't have much." She thinks she just wants a "simple" will that will provide for her mother in case her mother outlives her. The attorney should explore with Mary the advantages and disadvantages of a simple will, a testamentary trust, and a revocable trust with a pourover will. Mary will then have the information necessary to make an informed decision.

The attorney should also discuss with Mary her mother's financial status. If her mother is currently receiving or it is anticipated that she soon will qualify for and need to receive public benefits, such as Medi-Cal, Mary should consider whether her mother would be disqualified from receiving these benefits if she inherits Mary's estate.

The attorney should explain to Mary why it is generally considered poor planning for someone in the younger generation to leave significant assets to someone in an older generation, *i.e.,* Mary's mother, especially someone with a relatively short life expectancy. Such a plan often results in the necessity of administration, whether by probate or under the provisions of a trust, in two estates in a relatively short period of time. Each administration can incur significant costs and require a good deal of time and paperwork. More importantly, Mary's mother may not leave her estate as Mary would want.

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§9.7 (1) Plan With Will Without Testamentary Trust

If Mary wants to leave her entire estate outright to her mother, a will would accomplish that goal and would achieve her other stated goal of "keeping it simple," because a simple will is less complex and a shorter document than a revocable trust. The fee for preparing a will is less than the fee for preparing a revocable trust and a pourover will. Mary should understand, however, that if her mother inherits from her, her mother's estate would then be distributed according to her mother's will or trust and if her mother were to leave no estate plan of her own, her mother's estate would go to Mary's siblings, in accordance with the laws of intestate succession (as set forth in Prob C §6402(a)).

The will would dispose of the house, the small checking account in Mary's name alone, the brokerage account, the car, and the household furniture, furnishings, and personal possessions. In the will Mary would name alternate beneficiaries who would inherit if her mother dies before her.

Mary would name her mother as the primary beneficiary of the IRA account and name alternate beneficiaries on the forms provided by the plan administrator. She could keep the $40,000 bank account in joint tenancy with her mother. This would carry out Mary's desire that her mother receive her assets, and would give her mother quick access to these funds immediately at Mary's death.

Mary should also name alternate "contingent" beneficiaries should Mary's mother die before Mary, a likely event. It would not be uncommon for Mary to name her siblings as the contingent beneficiaries.

A will containing only basic provisions will help meet Mary's goal of a "simple" document. However, because a probate will be required, there are several standard provisions that would be helpful, such as waiver of bond for the executor and giving the executor a power of sale. Affirmatively stating that the estate may be administered under the Independent Administration of Estates Act (IAEA) (Prob C §§10400-10592) is helpful. (It is not essential, however, because a request for IAEA powers in a petition for probate would be granted in most cases.) A provision for nonprorata distribution is helpful when there is the possibility that there will be two or more beneficiaries. Because the total estate is well below the federal estate tax exemption equivalent, specific tax provisions may not be necessary. The attorney will need to review his or her basic will provisions to include or delete the many choices regarding powers of the executor and to decide which, if any, definitions would be helpful or needed.

Before deciding on a will, the attorney should discuss with Mary the issues of probate (see §§9.8-9.10) and real property reassessment (see §9.11) and the alternatives of a will with a testamentary trust (see §9.12) or a revocable trust (see §9.13) for the benefit of her mother. Another alternative to provide for Mary's mother without creating a testamentary trust or a revocable trust would be to leave a dollar amount outright to her mother and the rest of her estate to others, *e.g.,* her siblings, nieces and nephew, friends, or nonprofit organizations. Mary could, for example, leave the joint account with her mother, while leaving the balance of the estate to others, so that her mother would automatically become the sole owner of that account should Mary be the first to die.

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§9.8 (a) Probate Considerations

Often a client comes to the attorney's office with a clear and stated desire of avoiding probate, but without knowledge of what probate is or why it is to be avoided. Maybe the client's accountant has told her that she "needs a trust," or the client has experienced a nightmarish ordeal with a relative's estate.

In Mary's case, because the assets that would be distributed under the terms of a simple will total well over $100,000 (the amount that can be transferred by a simple affidavit procedure (Prob C §§13100-13116) without the necessity of a probate), her will would have to be probated. (Note that the joint tenancy account, the car, and the assets going to individuals named as beneficiaries of the IRA are not counted for this purpose.)

Even though Mary says she wants a "simple" and "inexpensive" plan, she probably is unaware of probate procedures and costs. The attorney should give Mary a quick overview of the court probate proceeding so she has some idea of what the process involves, what the costs are likely to be, and whether, once she has this information, avoidance of the process has become a priority for her.

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Source: Estate Planning/Complete Plans for Small and Mid-Size Estates/9 Plan for Unmarried Person Without Children/§9.9 (i) Procedure

§9.9 (i) Procedure

Mary should be informed that a probate proceeding involves three main tasks on the part of the executor, the person who is in charge:

- Gathering the assets of the decedent;
- Making sure that all legitimate claims and taxes are paid; and
- Distributing the remaining assets according to the terms of the will.

She should be told that the minimum amount of time required for a probate is 6 months: at least 1 month from the time the petition for probate is filed until the court date at which the court can order the will admitted to probate, appoint the executor, and issue Letters; 4 months after issuance of Letters during which time the estate must remain open for filing creditors' claims; and 1 month from the time the petition for final distribution is filed until the court date. Very often closing an estate at the end of 6 months is inappropriate or impossible, because real property sales, taxes, and other matters may require additional time.

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Source: Estate Planning/Complete Plans for Small and Mid-Size Estates/9 Plan for Unmarried Person Without Children/§9.10 (ii) Costs

§9.10 (ii) Costs

The attorney should explain the costs of a probate to Mary. At a minimum, the costs would include the initial filing fee of $355 (Govt C §70658(a)); publication costs of about $200; approximately $400 as appraisal fees for the probate referee (0.1 percent of gross value of estate appraised; Prob C §8961); certification and recording costs of approximately $35; $355 filing fee for the petition for final distribution (Govt C §70658(a)); and most importantly, compensation payable each to the executor and the executor's attorney, which is based on the gross value of the probate estate and is set by statute (Prob C §10800). The statutory fee is computed on the size of the probate estate as appraised, plus gains on sales (and income received during administration if the final account is not waived), less losses on sales. The fees are payable on completion of the estate and pursuant to court order.

The statutory compensation rate is as follows:

(1) From	(2) To	(3) Compensation on (1)	(4) Plus on excess above (1)
$ -0-	$ 100,000	$ -0-	4%
100,000	200,000	4,000	3%
200,000	1,000,000	7,000	2%
1,000,000	10,000,000	23,000	1%
10,000,000	25,000,000	113,000	0.5%
over 25,000,000		188,000	reasonable amount determined by court

Accordingly, for Mary's estate with a *gross* value of approximately $570,000 (value of assets that would be subject to probate), the attorney and the executor would each receive $14,400 in fees and commissions. Further, extraordinary attorney fees, for any extra services performed, such as the sale of the residence, may be requested, as well as extraordinary commissions, if the statutory amount is not adequate for services rendered.

With probate costs that could exceed $30,000, Mary may want to consider alternatives to a simple will. She must decide whether avoiding costs incurred after her death, which will be paid out of her estate, are more important to her than paying more now to have the attorney prepare a trust.

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§9.11 (b) Real Property Reassessment Considerations

One consideration in favor of leaving the estate to her mother is that a child can transfer his or her principal residence and up to $1 million in assessed value of other real property to a parent and (under Rev & T C §63.1) the transfer may be excluded from reassessment of real property taxes. If Mary's siblings then inherit the house from their mother when she dies, again there would be no reassessment because of the parent-to-child exclusion. If, on the other hand, Mary leaves the house outright to her siblings, there would be no exclusion for the transfer. For discussion of California real property taxation, see chap 3.

If it is clear that the house will be sold at Mary's death, reassessment may not be a consideration if Mary decides to leave her estate to someone other than her mother. The beneficiaries would inherit the house with a date-of-death value, and the supplemental taxes on reassessment would be prorated from the date of death to the date of sale. Thus the impact of the supplemental taxes would depend on how quickly the house is sold.

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§9.12 (2) Plan With Will That Includes Testamentary Trust

If Mary realizes that it may not be the best plan to leave her entire estate of almost $1 million outright to her mother, who is in her mid-eighties and in poor health, the attorney should explain that there are other ways of making sure that her mother will be taken care of if something were to happen to Mary. One option is to include a testamentary trust in Mary's will, which would provide that at Mary's death, if her mother survives her, the assets would be held in a trust for the benefit of her mother as long as her mother is alive, and then at her mother's death, pass to Mary's siblings (or other persons) or, *e.g.,* to a nonprofit of Mary's choice. Of course, this means a more complex document and higher costs.

Although it would not avoid probate, a will that includes a testamentary trust could address Mary's concern for her mother's care without requiring a transfer or funding of assets during Mary's lifetime. The trust would come into existence at Mary's death only if her mother survives her; if her mother dies before her, the will would provide for outright distribution to the contingent beneficiaries. Because Mary's mother is more likely to die before Mary, it is likely that the trust would never be created.

NOTE: The same considerations discussed in §§9.8-9.11 regarding probate and real property reassessment apply to a plan with a will that includes a testamentary trust. However, there would be no exclusion from reassessment of real property taxes because the property does not pass to the mother from the child.

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Source: Estate Planning/Complete Plans for Small and Mid-Size Estates/9 Plan for Unmarried Person Without Children/§9.13 (3) Plan With Revocable Trust and Pourover Will

§9.13 (3) Plan With Revocable Trust and Pourover Will

An alternative to a will, with or without a testamentary trust, and a way to address Mary's concern of providing for her mother if her mother survives her, is to create a revocable trust. A revocable trust would also avoid a probate. It would provide for lifetime management of Mary's assets, including management in the event of her incapacity, and for disposition of her assets at her death. At Mary's death, the trust would provide that the trustee pay to or apply for the benefit of Mary's mother, as much as she would need during her lifetime for her care. At her mother's death, or if her mother has predeceased Mary, the trustee would distribute the balance of the trust assets to those named by Mary, *e.g.*, her siblings, nieces and nephew, and/or a nonprofit.

Along with the trust, the attorney would prepare a "pourover will," which is a form of will that "pours over" to the trust any assets not in the trust that would be governed by Mary's will at time of her death.

NOTE: Although most attorneys title the document "Will of Mary R. Smith," some practitioners use "Pourover Will" as the title.

PRACTICE TIP: Items held in the testator's individual name, or that are not held in the trust, such as tangible personal property (vehicle, furniture and furnishings), or a small bank account, are easy to dispose of in the will, and these items do not need to be "poured over" to the trust. As long as the total value of such items is less than $100,000, no probate will be required. Prob C §13100. The client may decide to place some tangible property items in the trust and provide for other items in the will.

A revocable trust still may not be the preferred vehicle over a testamentary trust, however, because if Mary's mother dies before her, which is likely, a testamentary trust will not have to be funded, which will reduce the costs of preparing her plan. Mary also may wish to have the court supervision of a testamentary trust to ensure that the trust is properly set up and that her mother is adequately protected. Mary must also consider the value of having a testamentary trust for her mother (for possibly a short time because of her mother's advanced age), versus having a will with no trust provisions.

NOTE: The same considerations discussed in §9.11 regarding real property reassessment apply to this plan that creates a revocable trust.

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§9.14 b. Siblings

If Mary has total faith and trust in her siblings to "do the right thing" and provide for their mother without the formality of extensive trust provisions or leaving everything to her mother, Mary might decide to leave her estate to her siblings in a simple will or revocable trust, but include in the will or trust a statement of her wishes. Because her siblings are all mature adults, there would be no need to hold the estate in a testamentary trust or continue a revocable trust after Mary's death. Mary could include precatory language in her will or trust that expresses her wish and desire (but does not require or direct) that if her siblings receive her estate, they should use it to help their mother, "if needed and appropriate." Such a statement would be a reminder to all that Mary wants to make sure that her mother receives any assistance she may need, without either disqualifying her mother from Medi-Cal or other government benefits to which she is or might become entitled, or setting up a formal trust. Mary should understand, however, that her wishes are not legally binding on her siblings.

The attorney should question Mary about the disposition of any gift to a sibling who predeceases her. Does Mary want that person's share go to his or her issue, "per capita at each generation" (see Prob C §247) or "by right of representation" (see Prob C §246), to that sibling's spouse, or to the surviving siblings in equal shares? Although the anti-lapse statute (Prob C §21110) would apply to "kin" if the will were silent as to the contingent beneficiary, it is always good practice to set forth the scheme of disposition, to make clear to everyone, and especially the beneficiaries, what the intended result is, even if the intended result is what would happen under the default provisions of the intestate succession statutes.

If Mary desires that her estate be distributed to her siblings and not to her mother, the joint tenancy account with her mother should be terminated and put into Mary's sole name. Mary's agent under a durable power of attorney would have access to the account during Mary's lifetime, and at Mary's death it would be subject to her will. Mary may also consider putting a sibling's name on the account instead of her mother's.

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§9.15 c. Minors

If Mary wants to make some small gifts to her nieces and nephew, there are a number of considerations, mainly whether the beneficiary is a minor (*i.e.,* under age 18) and how large the gift will be. A small outright gift to a minor may best be provided for as a gift to a custodian under the California Uniform Transfers to Minors Act (CUTMA) (Prob C §§3900-3925). The provisions of the Act are, in effect, statutory trust provisions, and serve to avoid the need for extensive drafting. Unless otherwise provided, a CUTMA asset is distributed to the beneficiary when he or she attains age 18, but the testator may specify an age up to 25 in a testamentary document, or to age 21 in a nontestamentary document. Mary may designate the custodian, such as a sibling, in-law, or friend. If she makes the gift under the terms of her will or trust, she may authorize her executor or trustee to designate the custodian. Only one person may serve as custodian at a time (*i.e.,* there cannot be co-custodians). Mary should be encouraged to name an alternate or successor custodian or give the executor the power to nominate one.

Gifts to minors might also be an issue if Mary leaves her estate to her siblings, either by will or trust. Mary may wish to provide for the children of a sibling who does not survive her. Mary's brother Carl, *e.g.,* has a 13-year-old son. In the event that Carl does not survive Mary, Mary may provide that his one-third share be distributed to his son. To avoid the necessity of a guardianship if his son is a minor at the time of distribution, trust provisions could be set up for the nephew, but a simpler alternative for a contingent minor beneficiary is to make the contingent gift to a custodian under CUTMA.

PRACTICE TIP: When making a gift under CUTMA, include the minor beneficiary's birth date, if known. This serves as a reminder to all parties (the beneficiary, custodian, and third party institution) of when the time for outright distribution to the minor is reached.

If Mary wants to make a small specific gift to any of the minors at her death, she should be asked whether she wants to make these gifts even if there is very little left in the trust by that time. It should be pointed out to her that specific gifts will be honored first, before the remaining trust assets are either kept in trust for her mother or distributed to the remainder beneficiaries. See Prob C §21402.

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§9.16 d. Charitable Organizations

Qualified charitable organizations are ideal beneficiaries for an IRA or other deferred compensation asset, because a charity does not have to pay income taxes on the funds, whereas an individual does. If the IRA is not needed for her mother's support, Mary may choose to name a charity directly as the beneficiary. In any event, Mary needs to verify her current beneficiary designation, if any, to confirm that the named beneficiary is appropriate to her desires, or to update it.

Mary is 60 years old and has not yet drawn on these funds. However, in another 5 years she may have started withdrawing funds from her IRA, thus depleting this asset, whereas the value or her house may continue to appreciate. Her mother's health may have worsened; her nephew may need assistance for college. All of these possibilities are reasons to advise Mary to review this plan every few years or when there is a major change of circumstances in her life. If Mary decides to make a dollar bequest to a nonprofit, the attorney should discuss whether the gift should be made on the condition that the residuary estate be of a minimum amount, or consider making the devise as a percentage of the estate in the event the estate is diminished in value at the time of Mary's death.

Whenever a nonprofit organization is to be named as a beneficiary, it is important to determine the correct one. There are national organizations with local chapters and organizations with similar names. The white pages may list the nonprofit's address and telephone number. Mary should be told to call to speak with the planned giving department to ascertain the correct name of the organization. The organization may have a website that can also helpful.

Many organizations have a political arm, and donations to that part of the organization are not tax-deductible, while donations to that organization's foundation (or other name that indicates the charitable branch) are not for use for political purposes and therefore qualify for the tax deduction. If the nonprofit has a foundation that is different from the organization, the attorney should confirm with the client which organization the client wishes to benefit. For example, some University of California campuses have a separate foundation from the Board of Regents and some do not. Many organizations, *e.g.,* the ACLU and others, have foundations that receive tax-deductible donations.

Sometimes a client will have a general desire to benefit a cause, such as Alzheimer's research. There are many listings of related organizations—just in Sacramento, for example—so it is important to discuss the specific one. The attorney could also suggest that the client leave it to a regional foundation that will see that the client's desires are carried out. Only full inquiry and discussion as to the client's charitable desires will identify the desired organization(s).

A revocable trust may not be the preferred vehicle over a testamentary trust if nonprofit organizations are the ultimate beneficiaries, for several reasons: Mary's mother is more likely to die before her, a will is a simpler document, and, if the nonprofit will be the primary beneficiary, avoidance of probate may no longer be a concern. Also, the simplicity of changing from the nonprofits to other beneficiaries and keeping the document shorter may weigh in favor of a testamentary trust over a revocable trust in this scenario.

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§9.17 e. Mary's Decisions

After discussing the issues, Mary decides that she would like the attorney to draft a revocable trust and to make sure that her mother is taken care of while her mother is alive. Her mother's finances are secure and Mary does not anticipate that her mother will need Medi-Cal or other needs-based government benefits. Mary knows that as long as she, Mary, has capacity, she will use her assets to help her mother if her mother's finances are insufficient. If Mary becomes incapacitated, she wants her successor trustee to be able to use trust funds to help her mother if her mother needs some financial assistance. However, she wants such expenditures to be limited to the maximum annual gift tax exclusion amount and to be used only to provide for her mother's health needs and maintenance needs.

Mary has considered the real property tax issue but is not concerned that there will be significant supplemental real property taxes assessed after her death, because she expects that the property will be sold within a reasonable period of time.

At her own death, Mary wants to make a $5000 gift to Habitat for Humanity and a $2000 gift each to her nieces and nephew from the trust. These gifts should be made, however, only if her trust estate at the time of her death has a value of more than $100,000 after debts and taxes are paid. Mary does not care whether the gift to the organization, which is presently a qualified charitable organization, will qualify for a tax deduction.

Mary also wants her personal property to be distributed at her death equally to her sister Barbara and her friend Cynthia. If either Barbara or Cynthia dies before Mary, she wants the personal property to go to the survivor. If neither survives Mary, she wants the personal property to be distributed in equal shares to her nieces, Deborah and Elisabeth.

After making the specific gifts, Mary wants the trustee to use trust funds for her mother's health, support, and maintenance, if her mother needs financial help for these purposes. Mary wants to give the trustee total discretion to decide when, how much, and for what purposes (within the general purposes of health, welfare, and maintenance) funds should be expended.

At her mother's death, Mary wants whatever is left in the trust to be divided evenly between Barbara and Cynthia. If Barbara is not alive, her share will go, in equal shares, to Deborah, Elisabeth, and Fred. If Cynthia is not alive, her share will go to her son William. If none of these persons is alive at the time of distribution, the trust estate will be distributed to Mary's brother, Andrew, and if he is not alive, then in equal shares to the issue of Deborah, Elisabeth, Fred, and William by right of representation.

If Fred is under age 21, his share will go to Barbara as custodian under CUTMA, with Fred's mother, Janet, the alternate custodian. Although Mary is a little worried that Carl may challenge her estate plan, Mary does not want to leave him anything. Because a no-contest clause is an ineffective deterrent if the contestant does not have a beneficial interest in the estate, she has decided not to include a no-contest clause in her estate planning documents.

Mary wants her car to go at her death to her favorite niece Deborah. She understands that this provision will be included in her will, as title to the car will remain in Mary's individual name, and not be transferred to the trust.

After careful consideration, she has decided that she wants whatever remains in her IRA account to be divided between Deborah and Elisabeth. She will change her beneficiary designation on the IRA account.

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§9.18 f. How the Plan Will Be Implemented

The revocable trust will be created immediately and Mary will transfer the house, the brokerage account, and the household furniture, furnishings, and personal possessions to the trustee of the trust. Because the bank savings account now in joint tenancy with her mother contains a significant amount of cash, the plan will call for her to close the account, thus severing the joint tenancy, and open a new account as a trust account. The pourover will will provide for distribution of the small checking account in Mary's name alone and the car without the need of a probate, because they total less than $100,000 in value. Prob C §13100.

The attorney will prepare a deed transferring title to the house to the trustee of the trust and a Preliminary Change of Ownership Report (PCOR) (see chap 12). After the trust has been established and the deed signed and notarized, the attorney will have the deed recorded. The PCOR, which must accompany the deed, will be forwarded to the assessor. The attorney will obtain stamped copies for his or her own records to show that the deed has been recorded, but will have the original returned to the client once it is processed by the recorder's office. The attorney will also prepare a document assigning Mary's household furniture, furnishings, and personal effects to the trustee of the trust. See chap 12.

Mary will be responsible for obtaining the papers necessary to transfer title to the brokerage account to the trustee of the trust. She is to obtain change-of-beneficiary forms for the IRA. She is told that she should bring those papers with her when she comes to the office to sign all of the estate planning documents. She is also told that she will be responsible for closing the joint tenancy bank account and opening a new account in the name of the trust after the trust is executed.

For full discussion of implementing an estate plan, see chap 12.

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§9.19 2. Who Will Control Mary's Assets

The attorney should explain to Mary the various roles and titles of the person or persons who will control her assets while she is alive if she becomes incapacitated or chooses to relinquish control, and after her death. She should understand that while she is alive and has capacity, she will retain total control of her assets and estate management.

If at some point she no longer has legal capacity to handle her own affairs (see §9.20), fiduciaries she has named in her estate planning documents will become responsible for managing her assets. For assets that are included in the trust—most importantly the house, the large brokerage account, and the bank savings account—the successor trustee will become responsible. For assets outside the trust, such as the IRA, the car, and the small bank account, the person Mary has named as her agent under a power of attorney for financial management will be the responsible fiduciary. In addition, the agent will have the authority to take care of other management tasks, such as paying bills, seeing to the preparation and filing of Mary's tax returns, applying for any benefits to which Mary might be entitled, and initiating or defending lawsuits on Mary's behalf. Because the primary purposes of the power of attorney is to authorize the agent to act for Mary if she becomes incapacitated, the power of attorney will be durable, *i.e.,* it will be effective as long as Mary remains incapacitated.

If Mary becomes incapacitated and there are matters involving her financial affairs that are beyond the scope of the authority of the successor trustee and agent under her power of attorney, a court-appointed conservator of the estate may be required. Even though it is not anticipated that a conservator of the estate will be necessary if the trust and durable power of attorney are in place, Mary should nominate the person she would want to act as conservator of her estate.

Finally, Mary should understand that at her death the power of attorney terminates. The successor trustee continues to be responsible for managing and distributing the trust assets. The person nominated as executor of her will becomes responsible for assets governed by the will if a probate is required and the nominee is appointed by the court. Beneficiary designations will control distribution of assets to named beneficiaries, such as those designated in the IRA.

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§9.20 a. Determination of Incapacity

Although it is unnecessary to define a triggering event for a durable power that is immediately effective (see §9.25), the trust must provide a mechanism for removing a settlor-trustee when he or she lacks capacity to manage trust assets. If removal is triggered on the settlor's incapacity, the trust document should describe how incapacity will be ascertained and by whom. If the settlor is to resume the powers and duties of the trustee on restoration of capacity, the trust document should define and describe the meaning and determination of restoration.

Planners generally want to avoid the need for a successor trustee to seek a court order to remove the trustee as the primary method of determining incapacity. The need for a court order would defeat the purpose of including an incapacity clause in the trust document. Instead of a court-issued opinion of incapacity, the settlor may prefer that the settlor's removal be triggered by a physician-issued written statement that, in the physician's opinion, the person lacks capacity to manage his or her financial affairs. For example, many instruments provide that incapacity is presumed on the written opinion of one or more licensed physicians that the principal is incapable of handling financial transactions. Alternatively, the instrument may require that the principal's treating physician give such an opinion.

It may be difficult, however, to get a physician's opinion of incapacity. In addition, many physicians are reluctant to discuss their patient's conditions with anyone other than the patient because of concerns about violating the Privacy Rule adopted under the federal Health Insurance Portability and Accountability Act of 1996 (HIPAA) (Pub L 104-191, 110 Stat 1936) (42 USC §§1320d-1320d-9) and California's Confidentiality of Medical Information Act (CMIA) (CC §§56-56.37). Thus, the various estate planning documents now commonly include provisions that specifically allow the medical provider to discuss a patient's medical conditions with the agent and to provide a written declaration regarding the patient's capacity. The documents also provide that the patient waives his or her HIPAA privacy rights.

To avoid the publicity and expense of a court proceeding and the difficulty of obtaining a physician's statement of opinion, practitioners should consider having the settlor give one or more persons the power to determine conclusively that the triggering event has occurred. The power can be given to the successor trustee, family members, a trusted friend, or a committee of such persons, including the settlor's physician. Some individuals may be offended by the idea of a nonphysician determining *whether* the principal is incapacitated. As an alternative to requiring a determination that the trustee lacks capacity, the trust document could simply require a determination by the successor trustee that the trustee is no longer able to effectively manage the affairs of the trust.

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b. Considerations in Selecting Fiduciaries

§9.21 (1) In General

The selection of appropriate fiduciaries is one of the most important decisions the client will face in the estate planning process. Sometimes clients believe that they must name different individuals to fill the different fiduciary roles. At the conference with Mary, her attorney should explain that, although different assets will be the responsibility of differently titled fiduciaries, the same person can be named to fill each of these roles. She should also understand that although the responsibilities of the successor trustee will continue after Mary dies, the power of attorney will terminate automatically at her death, and the executor's authority only begins if appointed by the court after Mary's death. A conservator is a fiduciary appointed by the court to act for a person who is unable to manage his or her personal care or financial affairs. See §9.30. In every case, the attorney and client should discuss who will be named as alternate fiduciaries if the primary fiduciary is unable to act in the event of death, incapacity, or resignation.

Selecting fiduciaries involves competing considerations. The client may have complete confidence in a relative or friend to make health care decisions because the person understands the client's wishes on these very personal life-and-death decisions and will carry out the client's wishes. It may be, however, that the same person hates financial record keeping, never balances his or her checkbook, and has no interest in his or her own financial affairs. This person would make a fine choice as the client's agent under a health care power of attorney, but a poor choice as the successor trustee or agent under the power of attorney for financial matters. Often the decisions are based on who the beneficiaries are; if there are a number of beneficiaries and, *e.g.,* there are possible personality conflicts among them, the client will want to name as her fiduciary a trusted person who will be sensitive to the different needs and personalities of the beneficiaries.

AUTHOR'S ADVICE: Some clients want to name their accountant, lawyer, financial advisor, or banker as their trustee or agent. This author generally discourages these appointments other than in very rare circumstances. Most professionals, unless they are a professional fiduciary, are too busy to take on the task of acting as trustee or agent. In addition, it is likely that their malpractice insurance does not cover errors and omissions when acting as a trustee or agent.

WARNING: Probate Code §21350 lists prohibited transferees, including drafters of the documents, who may not receive gifts from persons unless there is an exception. See chap 6. Many drafters believe it is prudent to obtain a certificate of independent review issued by another disinterested attorney, even if the drafter is nominated only as an executor or trustee.

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Source: Estate Planning/Complete Plans for Small and Mid-Size Estates/9 Plan for Unmarried Person Without Children/§9.22 (2) Executors, Successor Trustees, and Agents

§9.22 (2) Executors, Successor Trustees, and Agents

Executors and successor trustees have different responsibilities. An executor's responsibilities generally are more limited in time and scope compared with those of a successor trustee of a revocable trust, who may be called on to serve during the client's lifetime and then possibly for a long time after the client's death. The attorney should tell Mary that she will nominate the executor, but if a probate is required, it is the court that appoints the executor, guided by the decedent's nomination. A successor trustee, however, is generally not court appointed unless there is no one named, or the person(s) named are unable or unwilling to serve.

In choosing an executor, it is helpful if the person has some financial management skills, but trust and confidence in the person are more important than financial sophistication, because the attorney will do much of the work and advise the executor throughout the probate proceeding about his or her duties and responsibilities.

The considerations for a trustee, whether under a testamentary trust or revocable trust, are somewhat different than for an executor. The trustee's primary duty and responsibility is to manage assets, so management skills are a major consideration. The trustee does not have to be knowledgeable about investments, but must be able to manage a checking account, use diligence in selecting an investment advisor, and see to the preparation of income tax returns, possibly over many years. Mary's attorney may need to educate her about the duties of a trustee in order for her to make good choices. Age of the prospective trustee may be a factor when the trust may be managed for a number of years. A trust can be managed from a distance, unless rental property or some other assets or factor requiring proximity to the assets is a concern. If factors of trust and personal relationships favor an out-of-state person, residency alone should not be a disqualifying factor. The person selected as trustee, however, must be a United States citizen to avoid having the trust treated as a foreign trust (see IRC §7701(a)(30)). Another reason to avoid a noncitizen trustee is that some foreign countries require a citizen trustee to file a tax return, adding additional tasks and costs for the trustee.

PRACTICE TIP: The attorney must be prepared for a discussion about the lack of management skills of a close relative and deciding on suitable persons when there will be continuing trusts. However, if the estate is to be distributed outright by the trustee after Mary's death, and there are no continuing trusts, the primary beneficiary may be the logical choice for trustee, as long as the beneficiary is of sufficient age and maturity.

If Mary becomes incapacitated, her agent under the durable power of attorney will have more day-to-day responsibilities for Mary's personal affairs and care than the successor trustee. She may also have to deal with bureaucracies on Mary's behalf if Mary is entitled to any public benefits.

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§9.23 c. Cofiduciaries

Sometimes clients worry about offending one relative or friend if they name another relative or friend as successor trustee or as an agent. The attorney should emphasize that the most important consideration is that Mary have the utmost trust in the person. In deciding whom to name as financial fiduciaries, Mary should be advised to consider the person's business sense, the dynamics among family members, and the chosen individual's communication skills, as well as the person's physical proximity to her.

If Mary is considering naming cofiduciaries or different fiduciaries to fulfill different roles in order not to offend anyone, the attorney should discuss with her the logistical problems that such an arrangement often entails, especially if the fiduciaries must act together, *e.g.,* in signing every check or making every purchasing decision. If Mary insists on co-agents, the attorney should advise her to indicate in the power of attorney whether they may act separately, and, if so, with regard to which actions. Otherwise, it will be presumed that they must act jointly. Prob C §15620.

NOTE: If Mary's plan calls for her to retain the joint tenancy bank account with her mother, her mother will continue to have access to the funds in the account and could use them for Mary's benefit, even if not named as an agent under Mary's power of attorney.

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§9.24 d. Successor Trustee

Mary will act as the initial trustee of her trust. Because the successor trustee will be responsible for managing the largest and most significant of Mary's assets if Mary becomes incapacitated or resigns, and for managing the trust and distributing the assets after Mary's death, the attorney should review with Mary the main provisions that will govern the trustee's powers and duties. The attorney should determine, for example, whether Mary wants to state in her trust that remaining at home is a priority for her even if this results in significant expenditures. If Mary wishes to impose limitations in the power of attorney on the agent's authority to handle her assets, those same limitations also should be included in the trust provisions for the successor trustee.

If the successor trustee becomes the acting trustee while Mary is alive, he or she will manage and distribute the assets for Mary's benefit. At Mary's death, the focus will change; the trustee will then be acting on behalf of the remainder beneficiaries of the trust and will have to communicate with the beneficiaries regarding trust matters. When naming the successor trustee, the client should keep in mind that the successor will have ongoing responsibilities, possibly for many years, especially if the trust will continue after the client's death, *e.g.,* for the benefit of an elderly parent or for minors.

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e. Agent Under Power of Attorney

§9.25 (1) Springing or Immediately Effective Durable Power of Attorney

The attorney should discuss with Mary whether she wants the power of attorney, although valid from the time it is signed, to become effective only when and if she becomes incapacitated or when some other triggering event occurs, *e.g.,* when she reaches a certain age. This kind of power of attorney is called a springing power of attorney. Alternatively, the power of attorney may be made effective immediately from the time it is validly executed. The advantage of an immediately effective power of attorney is that it is usually easier to use with third parties because there is no need to prove that the triggering event, usually incapacity, has occurred. It is, however, riskier because it gives the agent immediate access to Mary's assets not in the trust and thus raises the possibility of abuse.

The attorney should understand that Mary's decision will hinge on the degree of trust she has in her agent and her understandable reluctance to give such broad power to someone else while she is still able to manage her own affairs. If Mary decides on a springing power of attorney, she should be presented with the alternatives for determining when she is incapacitated. See §9.20.

PRACTICE TIP: If a client wants a springing power of attorney, one way to avoid the usual delays in proving the principal's incapacity is to designate, in the power of attorney, specific persons who have the power to determine that the client is incapacitated.

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§9.26 (2) Statutory Form Power of Attorney

Mary's attorney will decide whether to use a statutory form or attorney-drafted power of attorney. Many attorneys prefer to use the Uniform Statutory Form Power of Attorney (Prob C §4401) because it contains shorthand references to the statutory powers found in Prob C §§4450-4465, which makes the document appear short and readable. It is now more readily accepted by many third parties who are familiar with the form. Because Mary does not have a very large estate that includes unusual assets requiring a lot of detailed specific drafting, and the agent probably will not control the most significant assets, Mary's attorney will prepare the statutory form power of attorney.

The attorney should review the powers granted in the statutory form during one of the face-to-face meetings with Mary before she signs the document. There may be some powers that, once explained, Mary will not want to grant to her agent. For example, the statutory form includes powers to buy, sell, and exchange any stocks, bonds, mutual funds, all other types of securities and financial instruments (Prob C §4453), commodity futures contracts, and call and put options (Prob C §4454). Mary is a very conservative investor and would only want to authorize her agent to make conservative investments. Any limitations on the agent's authority to exercise the statutory powers should be included in the space provided in the statutory form and, if that space is insufficient, in an attachment to the form. See Prob C §4450.

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§9.27 (3) Powers That Must Be Specifically Included

It is important to address certain powers not found in the statutory form if Mary wishes to give them to her agent, because additional language must be added. If, for example, Mary wants her agent to have the authority to make gifts, the power of attorney should identify the persons or class of persons who may receive the gift, such as her mother, her nieces or nephew, or a charitable organization. The provision should define the limits of the authority, whether it be unlimited or within the federal annual gift tax exclusion amount under IRC §2503(b) or any successor statute. Often this power is given in larger estates to reduce the estate for estate tax purposes. However, it can be helpful to make a smaller gift to a relative or friend without having to change one's will, and it can help avoid probate of an asset.

The attorney must be careful not to give the agent too great a power to benefit himself or herself, as the assets may be considered part of the agent's estate.

The second power to discuss with Mary is whether she wants the agent to have the powers listed in Prob C §4458 regarding estate, trust, and other beneficiary transactions. These powers include the power to transfer assets to Mary's trust, which could be helpful if, after Mary establishes her trust, property is inadvertently not titled in the trustee's name. If Mary does not want her agent to have this statutory power, that should be stated in the power of attorney.

The attorney should assure Mary that the Uniform Statutory Form Power of Attorney will not allow her agent to modify or revoke her trust unless it is both (1) expressly permitted by the trust instrument (Prob C §15401(c)), and (2) expressly authorized by the power of attorney. Prob C §4465. However, giving an agent an appropriately limited power to amend a trust can provide the flexibility needed to address changing circumstances, including changing tax laws, unexpected Medi-Cal eligibility problems, and unexpected beneficiary incapacity or financial problems.

PRACTICE TIP: Some practitioners routinely include in revocable trusts a provision that permits an agent under a durable power of attorney to revoke or amend the trust, because failure to include this provision in the trust could result in an inadvertent (and all too conspicuous) failure to comply with Prob C §15401(c) if the power of attorney document explicitly confers revocation and amendment powers.

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§9.28 (4) Personal Care Decision-Making Powers

A power of attorney may include powers regarding personal care decisions, such as the power to determine where the principal will live, to arrange to provide meals, hire household employees, provide transportation, handle mail, and arrange recreation and entertainment. Prob C §4123(a), (c). If the personal care powers are included in a statutory form power of attorney, the specific powers are set out in Prob C §4460. These powers may alternatively be included in a power of attorney for health care (Prob C §4671(b)) or in a separate document (Prob C §4123(a)).

Because many of the personal care powers involve incurring expenses, Mary's attorney usually includes them in the power of attorney for financial affairs. Mary's attorney should discuss these powers with Mary. Assuming that she wants to include them and that they will be included in the power of attorney for financial affairs, the estate plan should either include a nontrust bank account with sufficient funds for the agent to use or authorize the agent to request, and the trustee to pay for, costs incurred by the agent exercising personal care decision powers.

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§9.29 (5) Power Over Joint Tenancy Assets

A co-owner of a joint tenancy bank account, even one who has not contributed funds to the account, continues to have full access to the account even if the joint tenancy co-owner becomes incapacitated. The noncontributing co-owner, however, has no duty to use the funds for the incapacitated co-owner. The attorney should make it clear that even with regard to a joint tenancy bank account or other joint tenancy asset, the client's agent under his or her power of attorney for financial matters will have power over the asset for the client's benefit. If the client dies first, the joint tenant becomes the sole owner of the bank account.

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Source: Estate Planning/Complete Plans for Small and Mid-Size Estates/9 Plan for Unmarried Person Without Children/§9.30 f. Conservator

§9.30 f. Conservator

If Mary should become incapacitated and, *e.g.,* issues arise over which the agent under the powers of attorney and advance health care directive has no authority, a conservatorship, which is a protective court proceeding, may be required. A conservator of the person is appointed to manage the personal care of someone who cannot properly provide for his or her personal needs for physical health, medical, care, food, clothing, or shelter. See Prob C §1801(a). A conservator of the estate manages the financial affairs of a person who is substantially unable to manage his or her own financial resources or to resist fraud or undue influence. Prob C §1801(b). As part of the estate planning process, Mary should be encouraged to sign a nomination of conservator, which can be done only when she has legal capacity.

Mary may be alarmed at the thought that a conservator might be appointed for her some day. She may have a relative, friend, or neighbor for whom a conservator has been appointed, or she may have read articles about abuses by conservators. She may be worried that she might be caught up in a public court proceeding that will involve a lot of paperwork and expense.

The attorney should explain to her that a conservator is usually not needed when the estate plan includes a properly designed power of attorney, but nominating a conservator can create a safety net in case the powers of attorney are insufficient. Moreover, nominating the person she would want to be in charge as the conservator may deter any unhappy family members from seeking appointment as a conservator of the estate, because generally the proposed conservatee's nominee will have priority over other persons seeking to be appointed as conservator. Prob C §1810.

The nomination of a conservator of the person or of the estate, or both, may be included in a writing (Prob C §1810), which may be a power of attorney for financial matters, a written advance health care directive (Prob C §4672(a)), or a separate document.

PRACTICE TIP: Many attorneys place the nomination in the health care power of attorney, but Mary's attorney places it in the power of attorney for asset management, because Mary's attorney fears that if the health care power of attorney is replaced, the new document might not include a conservator nomination. For example, before receiving major medical treatment or moving to a residential care or retirement facility, the principal often executes, by arrangement of the institution involved, a new health care directive regardless of whether the individual had a preexisting document. Unfortunately, the forms used often do not provide for nomination of a conservator.

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§9.31 g. Executor of Will

Mary may have heard the term "executor" but is unsure what the difference is between an executor, successor trustee, agent, conservator, and so forth. The attorney should explain that the person she names as executor of her will will be responsible for administering her estate after she dies to the extent that her assets are subject to her will. Unlike the role of a successor trustee or an agent under her power of attorney, the executor's job does not begin until Mary dies.

The executor nominated by Mary will have to petition the court for appointment if a probate is required.

The executor is entitled to compensation set by statute for acting in this capacity; the amount of compensation is the same as the attorney is entitled to as a fee (see §9.10). Often, a beneficiary who has a primary interest in the estate and acts as executor will waive compensation as the executor, especially because an inheritance is not treated as income, while compensation is income to the executor. In addition, a beneficiary acting as executor will be motivated to collect and distribute the assets promptly.

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§9.32 h. Mary's Decisions

Because Mary is creating a trust that will provide for her mother if her mother survives her, and Cynthia rarely has seen Mary's mother in the past decade, Mary decides to name her sister Barbara as her successor trustee. Even though Barbara lives in a city that is an hour's drive from where Mary and their mother live, Mary feels strongly that a trusted family member should have the responsibility of making sure their mother receives any financial assistance she may need from Mary's estate if Mary dies before her. Mary decides to name Cynthia as the first alternate and Andrew as the second alternate. Mary also decides to nominate Barbara as executor of her will, with Cynthia as the alternate and then Andrew as the second alternate.

After considering the different possibilities, Mary has decided that she wants Barbara, Cynthia, and Andrew to constitute the group who will decide whether she has become unable to perform the duties of the trustee. She wants two of the three to have to agree to remove her and also wants to require that two of the three agree that she has regained the ability to act as her own trustee.

Because Mary has complete trust in Cynthia, she wants a durable power of attorney for financial management that is effective immediately. She wants to name Cynthia as her agent, with Barbara as the alternate. Mary understands that the provisions of the power of attorney would authorize Cynthia to handle some of the day-to-day financial and asset issues that are part of everyone's daily life. For example, if it becomes unlikely that Mary will drive again, Cynthia could sell Mary's car. If it is necessary to begin to withdraw funds from the IRA account, or to withdraw larger monthly amounts to provide for Mary's benefit if Mary has already begun to take minimum distributions, Cynthia will have the authority to make those elections. If Mary needs household help, Cynthia will have authority to hire people to do whatever tasks need to be done, such as food shopping and preparation, errands, housecleaning, and driving Mary to and from appointments.

Mary is a very conservative investor, and her brokerage account is weighted 80 percent in bond funds and Treasury notes. She does not want her fiduciaries to change the balance to more than 30 percent in stock funds, and then only in stock index funds. She wants the rest of her investment portfolio to be invested in United States treasury bills, notes and bonds, conservative domestic bond index funds, money market mutual funds, and certificates of deposit. She also does not want her fiduciaries to have the power to invest on margin or to deal in futures contracts or call and put options. Mary decides that she wants these limitations included, even after her attorney has explained that there may be a time when it would be most prudent to have more than 30 percent of her brokerage account in stock funds and that if she trusts her agent's judgment, she could alternatively allow greater flexibility, *e.g.,* a maximum of 40 percent, and include a statement of her preference for continuing to invest very conservatively.

Because Mary does not want to keep a substantial nontrust bank account but wants to include personal care decision-making powers in her durable power of attorney for financial management in the event of her incapacity, her trust will include coordinated provisions directing her successor trustee to use trust funds to pay for personal care expenditures authorized by her agent.

Mary will close the joint tenancy account and open a new account opened in the name of the trust. Even though her mother will no longer automatically become the sole owner of the account if she survives Mary, the funds will still be available to be used for Mary's mother's benefit during her mother's lifetime under the terms of the trust.

Mary decides to nominate her sister as conservator of the person and estate and Cynthia as the alternate, and to include this provision in her durable power of attorney for financial management.

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§9.33 D. Formulating the Estate Plan for Health Care Decisions

No estate planning consultation is complete without a discussion about how health care decisions will be made if Mary becomes incapacitated. See §9.20. The attorney should explain to Mary that in California a person can sign a document called an advance health care directive that may include individual health care instructions or a power of attorney for health care naming an agent to make health care decisions in the event of her incapacity, or both. Prob C §§4605, 4629.

Although some attorneys prefer to use their own attorney-drafted AHCD (see §§10.24, 10.36), Mary's attorney generally uses the California Medical Association form, which contains both options, because it is recognized by health care providers throughout California and is often more readily accepted than less familiar forms. The attorney should review the form with Mary and make sure she understands that she can choose to fill out either part or both parts.

NOTE: Mary's attorney places a nomination of a conservator of the estate and person in the power of attorney for financial affairs. See §9.30. If it is not included in that document, it should either be included in the advance health care directive or in a separate written document.

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§9.34 1. Statement of Wishes

In the California Medical Association form, two options are presented regarding health care instructions, one stating the desire to prolong life as long as possible and the other directing that treatment be discontinued or withheld if the principal's condition is irreversible and life support is needed to keep him or her alive. The attorney should review the alternative statements about end-of-life care and make sure that Mary understands the meaning of the terms used and that she has an opportunity to ask questions.

Mary should also be told that if she names an agent, the agent will have the authority to make decisions after Mary's death about the disposition of her remains, organ donation, and authorizing an autopsy. Prob C §4683(b). Because clients often have strong feelings about these issues, it is important to know whether Mary wishes to provide instructions about cremation, burial, or organ donation. Any statements that Mary makes in the advance health care directive will control her agent's actions. Prob C §4683. Sometimes a client will ask that the document include the statement that the principal does not oppose cremation, but does not direct it. Mary should understand that any statement that she makes could be helpful to her family and friends when faced with making decisions about these subjects.

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§9.35 2. Agent Under Power of Attorney for Health Care Decisions

In choosing an agent, it is important that Mary choose a person who not only is responsible and trustworthy, but who will follow Mary's known desires, even if they conflict with the agent's views. Sometimes clients wish to name multiple agents in the advance health care directive. It should be pointed out to Mary that this can create problems when it is important, or even critical, that medical decisions be made quickly. If one agent is nearby and another far away and difficult to reach, this can create problems no matter how the situation is dealt with: If time is critical and the one available agent makes the decision, the other may later object to it; yet if the doctors wait until both agents can be reached to make a joint decision, critical time may be lost. Additionally, most physicians prefer to deal with one spokesperson.

Even while discouraging Mary from naming co-agents, she should be encouraged to name at least one alternate.

Sometimes even close relatives and friends realize in advance that they would be too upset at having to make life-ending decisions for someone close to them and would not want to be put in that position. Therefore, before Mary signs the health care directive, she should be told to make sure that whoever she names as her health care agent and alternates would be willing to act.

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Source: Estate Planning/Complete Plans for Small and Mid-Size Estates/9 Plan for Unmarried Person Without Children/§9.36 3. When the Power of Attorney Becomes Effective

§9.36 3. When the Power of Attorney Becomes Effective

It is important to discuss whether Mary wants her health care directive to operate immediately so that her agent can share in information provided by her doctors. Unless the health care power of attorney is expressly made immediately effective, it becomes effective only when the principal cannot make health care decisions for himself or herself. Prob C §4682.

PRACTICE TIP: Although it may be appropriate to give the agent immediate authority if the client is terminally ill, many clients do not want the health care directive to become effective unless and until the client is unable to communicate with his or her health care providers.

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§9.37 4. Mary's Decisions

Mary has said that if she is incapacitated she trusts two people to make the health care decisions that she would make for herself if she could—her sister Barbara and her friend Cynthia. Even though Barbara does not live as close as Cynthia, Mary has decided that she wants her sister to be the final decision-maker and to name her first. She wants to name Cynthia as the alternate. She likes the idea of asking Barbara to consult with Cynthia before making health care decisions, but does not think it is necessary to include a specific provision to that effect in the power of attorney.

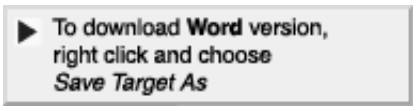
Mary has said repeatedly and quite adamantly that she "does not want to be kept alive on machines," so she will initial the statement to that effect on the CMA form. She does not want to be an organ donor. She wants to be cremated and her ashes scattered at sea, and she wants these instructions placed in the advance health care directive.

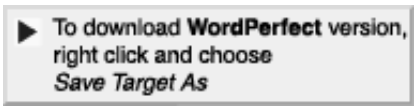
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Source: Estate Planning/Complete Plans for Small and Mid-Size Estates/9 Plan for Unmarried Person Without Children/ III. FORMS/§9.38 A. Form: Mary R. Smith Trust

III. FORMS

§9.38 A. Form: Mary R. Smith Trust





Description of document:

This form provides a suitable framework for a trust established by only one person. It may be used for an unmarried settlor or for a married settlor who desires to establish a trust funded entirely with separate property.

WARNING: This form is a sample based on the hypothetical in this chapter only. It is provided by the authors and is not constructed from forms in CEB drafting books. However, the form has been modified to follow the format of the forms in Drafting California Revocable Trusts (4th ed Cal CEB 2003). The drafter should refer to the text of Revocable Trusts before preparing a trust document.

References: As an aid to the reader, the following list contains cross-references to chapters in Revocable Trusts that contain additional alternative and optional provisions and discussion of how they should be used.

Topic	*Revocable Trust Chapters*
Opening declaration and creation of trust	5
Distributions during settlor's lifetime	6
Distribution on death of settlor	8
Additional distribution provisions	7, 8, 11, 18
Debts and expenses	15
Office of trustee	16
Trustee powers	17
Trustee duties and limitations on duties	16, 17
Rules of construction	18
Miscellaneous provisions	19
Revocation and amendment	20
Execution and acknowledgment	19
Sample trusts for individuals	Apps C, D

9.38-1 Sample revocable trust

THE MARY R. SMITH TRUST

OPENING DECLARATION

ARTICLE I. CREATION OF TRUST

ARTICLE II. TRUSTEES AND FAMILY DECLARATIONS

ARTICLE III. DISTRIBUTIONS DURING SETTLOR'S LIFETIME

ARTICLE IV. DISTRIBUTION ON DEATH OF SETTLOR

ARTICLE V. ADDITIONAL DISTRIBUTION PROVISIONS

ARTICLE VI. DEBTS AND EXPENSES

ARTICLE VII. OFFICE OF TRUSTEE

ARTICLE VIII. TRUSTEE POWERS

ARTICLE IX. TRUSTEE DUTIES; LIMITATIONS ON DUTIES

ARTICLE X. RULES OF CONSTRUCTION

ARTICLE XI. MISCELLANEOUS

ARTICLE XII. REVOCATION AND AMENDMENT

Signatures; Acknowledgment

THE MARY R. SMITH TRUST

I, MARY R. SMITH, also known as Mary Renee Smith and Mary Smith, sometimes hereafter called the Settlor, or the Trustee depending on the context, residing in Sacramento County, California, hereby create The Mary R. Smith Trust, declaring:

ARTICLE I
CREATION OF TRUST

A. *Initial Trust Property.* The property described in the attached list of Trust Property, marked "Schedule A," is now held by me in trust. This property and any other property later transferred to the Trust is hereafter referred to as the "Trust Property" and shall be held, administered, and distributed as provided in this document and any subsequent amendments to this document.

B. *Additional Property.* The Settlor or any other person may from time to time assign, transfer, and deliver or devise additional property to the Trustee to be held under and subject to all of the terms, conditions, and provisions of this agreement, which property shall become a part of the Trust estate upon its receipt and acceptance by the Trustee. Such additions and title to any property so added may be, but need not be, evidenced by an amendment to this agreement or by a schedule, and may be made by will, deed, assignment, or other writings transferring property to the Trustee. The Trustee may also be designated at any time as the beneficiary of a life insurance policy on the life of the Settlor or any other persons.

C. *Nature of Property.* All property now, or hereafter transferred to this Trust, is the separate property of the Settlor.

ARTICLE II
TRUSTEES AND FAMILY DECLARATIONS

A. *Initial Trustee.* Mary R. Smith is the initial Trustee of this Trust.

B. *Successor Trustees.* If MARY R. SMITH, for any reason, ceases to act as Trustee, then Settlor's sister, BARBARA SMITH, shall become Trustee. If BARBARA SMITH fails to qualify or ceases to act as Trustee, Settlor's friend, CYNTHIA SHIPP, shall become the Trustee. If CYNTHIA SHIPP fails to qualify or ceases to act, Settlor's brother, ANDREW SMITH, shall become the Trustee.

C. *Bond.* No bond shall be required of any person named as trustee in this document.

D. *Family Information*. Settlor is unmarried and does not have a registered domestic partner. Settlor has no children, living or deceased. Settlor has a mother living, JOAN SMITH, and three siblings, ANDREW SMITH, BARBARA SMITH, and CARL SMITH, all of whom are now living.

ARTICLE III
DISTRIBUTIONS DURING SETTLOR'S LIFETIME

A. ***Distributions to Settlor.*** **During the Settlor's lifetime, the Trustee shall pay to or apply for the Settlor's benefit, as much of the income and principal of this Trust as the Settlor requests, plus such additional sums as the Trustee in the Trustee's discretion determines is appropriate for the Settlor's health, support, comfort, enjoyment, maintenance, and welfare. The Trustee shall exercise this discretion in a liberal manner and the rights of the remainder beneficiaries of this Trust shall be considered of secondary importance.**

B. ***If Settlor Lacks Capacity to Make Requests.*** **For purposes of trust distributions during the Settlor's lifetime, the Settlor lacks capacity to make requests if the Settlor is a person for whom a conservator of the estate could be appointed under California law. The Trustee is not required to obtain a court adjudication of incapacity and may rely on the Trustee's personal judgment based on the Trustee's observations. The Trustee shall not be liable for any such determination that is not made in bad faith and for an improper purpose. If the Settlor lacks capacity to make requests, the Trustee shall pay for the Settlor's benefit the amounts of net income and principal necessary or desirable in the Trustee's discretion for the Settlor's health, support, comfort, enjoyment, and welfare until either the Trustee determines or a licensed physician certifies in writing that the incapacity is removed and the Settlor is again able to manage the Settlor's own affairs. Any income in excess of the amounts so applied for the benefit of the Settlor shall be added to principal.**

If a conservator of the person or estate is appointed for the Settlor, the Trustee shall take into account any payments made for the Settlor's benefit by the conservator.

C. ***Payment to Others*****. The Settlor may at any time direct the Trustee to pay single sums or periodic payments out of the Trust estate to any other person or organization. The Trustee may, in the Trustee's discretion, give to or apply for the benefit of the Settlor's mother, JOAN SMITH, up to the full extent of the federal annual gift tax exclusion under Internal Revenue Code §2503(b) or any successor statute, as much of the income and principal of the balance of the Trust estate as is necessary in the Trustee's discretion to assist with her mother's health care and maintenance needs. These gifts shall be made only if the Trustee determines that the Settlor's income and the Trust assets are sufficient to provide for Settlor's support, maintenance, and care for the remainder of Settlor's life, and would otherwise be consistent with Settlor's desires and prudent estate and tax planning.**

ARTICLE IV
DISTRIBUTION ON DEATH OF SETTLOR

A. ***Distribution on Death.*** **On the death of the Settlor, after paying or reserving sufficient funds for payment of expenses, debts, and taxes in accordance with the provisions of Article VI, the Trustee shall hold and administer, divide, and distribute the Trust estate, as follows:**

1. ***Gift of Personal Property.*** **The Trustee shall distribute all jewelry, clothing, household furniture and furnishings, and other tangible articles of a personal nature that are the property of the Trust at the time of Settlor's death, including property passing to the Trust as a result of the Settlor's death, to Settlor's sister, BARBARA SMITH, and Settlor's friend, CYNTHIA SHIPP, in substantially equal shares as they shall agree. If either BARBARA SMITH or CYNTHIA SHIPP fails to survive Settlor, these items will be distributed to the survivor of them. If both BARBARA SMITH and CYNTHIA SHIPP fail to survive Settlor, then these items will be distributed to Settlor's nieces, DEBORAH SMITH and ELISABETH SMITH, in substantially equal shares as they shall agree, or to the survivor of them. If the beneficiaries fail to agree on a division of the tangible personal property, the Trustee shall make the division. If no beneficiary named in this paragraph survives the Settlor, this gift will lapse and be added to the residue of the Trust estate.**

2. ***Monetary Gifts.*** **If the value of the Trust estate is greater than $100,000 after debts and taxes are paid, the Trustee shall distribute:**

a. The sum of Five Thousand Dollars ($5,000.00) to SACRAMENTO HABITAT FOR HUMANITY, currently located at 426 N. 7th Street, Sacramento, CA 95814.

b. The sum of Two Thousand Dollars ($2,000.00) ***each*** **to Settlor's nieces and nephew, namely, DEBORAH SMITH, ELISABETH SMITH, and FRED SMITH. If a beneficiary named in this paragraph fails to survive the Settlor, her or his gift will lapse and be added to the residue of the Trust estate.**

3. *Residue.* During the lifetime of Settlor's mother, JOAN SMITH, the Trustee shall pay to or apply for the benefit of JOAN SMITH as much of the income and principal of the balance of the Trust estate as is necessary in the Trustee's discretion for her health, support, and maintenance, after taking into consideration, to the extent the Trustee deems advisable, any income or other resources of JOAN SMITH, outside this Trust, known to the Trustee and reasonably available for these purposes. Any income not distributed shall be accumulated and added to principal.

4. *Distribution of Residue.* On the death of JOAN SMITH, or on the death of Settlor if JOAN SMITH is then deceased, the Trustee shall distribute the residue of the Trust estate as follows:

a. One-half (1/2) to Settlor's sister, BARBARA SMITH, and if she is not then living, then in equal shares to the Settlor's nieces and nephew, DEBORAH SMITH, ELISABETH SMITH, and FRED SMITH; and

b. One-half (1/2) to Settlor's friend, CYNTHIA SHIPP, and if she is not then living, then to her son, WILLIAM SHIPP.

ARTICLE V
ADDITIONAL DISTRIBUTION PROVISIONS

A. *Distribution to Heirs*. If at the time of Settlor's death or at any other time before full distribution of this Trust, all of Settlor's beneficiaries are deceased and no other disposition of the property is directed by this instrument, the Trust estate as then constituted shall be distributed to Settlor's brother, ANDREW SMITH, and if he is not then living, in equal shares by right of representation to the then-living issue of DEBORAH SMITH, ELISABETH SMITH, FRED SMITH, and WILLIAM SHIPP.

As used herein, the term "issue" shall refer to lineal descendants of all degrees, and the terms "child," "children," and "issue" shall include adopted persons.

B. *Distributions to Custodianship.* If FRED SMITH is under age twenty-one (21) at the time distribution is to be made, the Trustee shall make the distribution to BARBARA SMITH, as custodian, for FRED SMITH'S account, under the California Uniform Transfers to Minors Act (CUTMA) (Probate Code §§3900-3925) or a comparable statute of another state. The custodianship will remain in effect until FRED SMITH reaches the age of twenty-one (21). If BARBARA SMITH fails to qualify or ceases to act as custodian, then JANET SMITH shall act as custodian in her place. If JANET SMITH fails to qualify or ceases to act as custodian, the Trustee is authorized to make the distribution to a custodian named by the Trustee.

If any person (other than FRED SMITH) otherwise entitled to a distribution from this Trust is under the age of 21 at the time distribution is to be made, the Trustee is authorized to make the distribution to a custodian named by the Trustee under the California Uniform Transfers to Minors Act (CUTMA) (Probate Code §§3900-3925) or a comparable statute of another state. The custodianship shall remain in effect until the beneficiary reaches age 21.

C. *Distribution Powers.* For purposes of making distributions, the Trustee's powers include the following:

1. *Nonprorata Distributions.* When the Trustee is required, under the provisions of the Trust, to divide any Trust Property into parts or shares for the purpose of distribution, or otherwise, except as the donee of any power of appointment affecting such property may have expressly provided otherwise in the document exercising such power, the Trustee may, in the Trustee's discretion, make the division and distribution (prorata or nonprorata) in kind, including undivided interests in any property, or partly in kind and partly in money. The Trustee may make sales of the Trust Property that the Trustee deems necessary on such terms and conditions as the Trustee shall see fit to accommodate such distributions. In making nonprorata distributions to the beneficiaries under the terms of this Trust, the Trustee shall consider and attempt to equalize, insofar as practicable, the aggregate income tax bases of assets distributed to the various beneficiaries.

2. *Power to Delay Distribution or Division of Trust Assets.* Whenever the Trustee is directed to distribute Trust assets or divide Trust assets into separate shares on the death of the Settlor, the Trustee may, in the Trustee's discretion, delay the distribution or division until six (6) months after the Settlor's death.

If the Trustee defers distribution or division of the Trust assets, the deferred distribution or division shall be

made as if it had taken place at the time prescribed in this document in the absence of this paragraph, and all rights given to the beneficiaries of such Trust assets under other provisions of this document shall be deemed to have accrued and vested as of that prescribed time.

ARTICLE VI
DEBTS AND EXPENSES

A. *Payment of Debts and Expenses of Settlor's Estate*. On the death of the Settlor, the Trustee in the Trustee's discretion may pay out of the Trust estate, unless the Trustee in the Trustee's absolute discretion determines that payment has been adequately provided for under the Settlor's will or otherwise, without proration among any beneficiary under this Trust:

1. *Funeral and Last Illness Expenses.* Any or all of the Settlor's reasonable and unpaid last illness, funeral, and burial expenses;

2. *Inheritance and Estate Taxes.* Any or all of the inheritance and estate taxes, including penalties and interest, that arise by reason of the Settlor's death and are attributable to this Trust or to any property added to it from the Settlor's probate estate or otherwise; and

3. *Other Debts.* Any or all of the Settlor's debts that would be properly payable by the Settlor's probate estate if the Trust Property were included in a probate estate rather than this Trust and a timely creditor's claim was filed in that estate.

4. *Probate Expenses.* Necessary and proper expenses of administration of the Settlor's probate estate.

B. *Limitations on Sources of Payment*. Despite the provisions in Paragraph A, the Trustee shall not pay any estate or inheritance taxes (including interest or penalties), last illness and funeral expenses, attorney fees, administration expenses, debts, or other obligations of the Settlor or the Settlor's estate, from any retirement plan (including individual retirement account) benefits in which the Trust acquires an interest as a result of the death of the Settlor. Further, the Trustee shall not pay any such obligation from any life insurance or other property passing to the Trust on the death of the Settlor in accordance with a beneficiary designation unless the property would have been liable for the obligation had the property passed to an individual beneficiary rather than the Trust.

ARTICLE VII
OFFICE OF TRUSTEE

A. *Definition of Trustee*. As used in this document, the term "Trustee" shall refer to the above-named Trustee, and to any successor or successors in trust, without regard to number or gender.

B. *Scope of Trustee Provisions.* Except as otherwise provided, the provisions of this document concerning Trustee duties, powers, privileges, and protections from liability, apply to all Trustees, including Successor Trustees, of all trusts established by this document.

C. *Resignation of Trustee.* The Trustee may resign at any time by mailing notice to the persons entitled by law to receive a trustee's account. Unless circumstances are such that it is not necessary to replace the resigning Trustee, the resignation becomes effective on the acceptance of office by the Successor Trustee who replaces the resigning Trustee.

D. *Removal of Any Trustee.* Any Trustee, including the Settlor, may be removed in accordance with California law.

1. *Inability of Settlor-Trustee to Perform Duties as Trustee.* The Settlor shall cease to be a Trustee of this Trust if the Settlor lacks the ability to perform the duties of the Trustee. The Settlor shall be conclusively presumed to lack the ability to perform the Trustee's duties when two of the following persons execute written declarations under penalty of perjury that in their opinion the Settlor does not have sufficient understanding or ability to perform the duties of the Trustee, and when such declarations have been delivered to the Successor Trustee:

(a) Barbara Smith, 789 Elm St., Concord, California 94529, sister;

(b) Andrew Smith, 321 Magnolia St., San Mateo, California 94401, brother;

(c) Cynthia Shipp, 456 Oak Street, Sacramento, California 95825, friend.

The determination shall be effective when the persons making the determination deliver to the Successor Trustee declarations that state that the declarants have determined that the Settlor lacks the ability to perform the duties of the Trustee. In the event of such a determination, the Successor Trustee shall immediately give the removed Settlor written notice that the successor has assumed the position of Trustee. The notice shall be given by personal delivery to the Settlor.

The Settlor will conclusively be presumed to be able to perform the duties of the Trustee again when two of the above-named persons execute written declarations under penalty of perjury that in their opinion the Settlor has sufficient understanding or ability to perform the duties of the Trustee and when two such declarations executed under penalty of perjury have been delivered to the then-acting Trustee. The Settlor shall resume the duties of the Trustee on the date such declarations are received by the then-acting Trustee. The then-acting Trustee shall immediately give the Settlor written notice that the Settlor has been restored to the position of Trustee. The notice shall be given by personal delivery to the Settlor.

E. *Power to Name Successor Trustee.* A Trustee of this Trust shall have the power to name a person or entity who shall become that Trustee's successor if a successor is required and this document makes no other provision for a successor, or if the successors named in this document are not willing to act.

F. *Temporary Trustee*. If a then-acting Trustee or Cotrustee is temporarily unable to administer the Trust, the person(s) otherwise entitled to be the Trustee if the then-acting Trustee resigned shall become the Trustee until the then-acting Trustee can resume the duties of Trustee.

G. *Compensation*. Unless waived, the Trustee shall be entitled to a reasonable compensation for services performed under this Trust, and for all services in connection with the termination or revocation, in whole or in part, of any trust created in this document.

ARTICLE VIII
TRUSTEE POWERS

A. *Powers of Trustee.* Subject to any limitations expressly stated in this document, the Trustee shall have the following powers, duties, and discretions, in addition to those now or hereafter conferred by law:

1. *Continuing Investments.* To continue to hold any property and to operate at the risk of the Trust estate any business received or acquired under the Trust by the Trustee as long as the Trustee shall deem advisable.

2. *Management.* To manage, control, sell (for cash or on deferred payments), convey, exchange, partition, divide, improve, and repair Trust Property.

3. *Leases*. To lease Trust Property for terms within or beyond the term of the Trust and 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.

4. *Borrowing*. To borrow money, and to encumber or hypothecate Trust Property by mortgage, deed of trust, pledge, or otherwise for the debts of the Trust or the joint debts of the Trust and a co-owner of Trust Property.

5. *Insurance.* To carry, at the expense of the Trust, insurance of such kinds and in such amounts as the Trustee deems advisable to protect the Trust estate and the Trustee personally against any hazard.

6. *Litigation and Compromise*. 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. *Investment*. To invest and reinvest the Trust estate in every kind of property, real, personal, or mixed. The Settlor is a very conservative investor and directs that the Trustee shall be limited to investing no more than 30 percent in stock funds, specifically limited to stock index funds. The balance of the investment portfolio shall

be invested in United States Treasury bills, notes, and bonds, conservative domestic bond index funds, money market mutual funds, and certificates of deposit. The Trustee shall not have the power to invest on margin or to invest in futures contracts or call and put options.

8. *Securities Management*. Except as otherwise specifically provided in Paragraph 7, with respect to securities held in the Trust, to have all the rights, powers, and privileges of an owner, 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; and to exercise or sell stock subscription or conversion rights.

9. *Compliance With Restrictions*. If the Trustee receives any stock or securities, partnership interest, or other assets, or any interest therein subject to any restriction or provision regarding their sale or transfer, the Trustee shall fully comply with the terms of such restrictions or provisions if valid.

10. *Principal and Income*. Except as otherwise specifically provided in this Trust, 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 Revised Uniform Principal and Income Act as amended from time to time. Any such matter not provided for either in this Trust or in the California Revised Uniform Principal and Income Act shall be determined by the Trustee in the Trustee's discretion.

11. *Partnerships*. To act as a partner, and enter into partnerships, limited or general, and to perform all acts as may be necessary or appropriate for a partner, in the Trustee's discretion.

12. *Payments to Minor or Disabled Beneficiary*. Except as otherwise specifically provided in this Trust, the Trustee in the Trustee's discretion may make payments to a minor or other beneficiary under disability by making payments to the beneficiary's personal representative or to any suitable person with whom the beneficiary resides, 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 if in the Trustee's judgment the minor is of sufficient age and maturity to spend the money properly.

13. *Policies and Plans*. On receipt of proof that the Settlor has died or that the proceeds of insurance policies or employee benefit plans have become payable to the Trustee, the Trustee shall use reasonable efforts to collect all sums payable to the Trustee under the terms of such policies or plans. The Trustee shall have full power and authority to compromise, arbitrate, or otherwise adjust any claim, dispute, or controversy arising with respect to those policies or plans and shall have full authority to initiate, defend, settle, and compromise any legal proceeding necessary in the Trustee's opinion to collect the proceeds of any policy or employee benefit plan. The Trustee shall be fully indemnified from any action the Trustee takes to collect the proceeds from any insurance policy or employee benefit plans, against all liability, costs, and expenses the Trustee may incur in any action, if the Trustee acts as a prudent person would in the management of property held for the benefit of others.

14. *Title*. To hold any property in the Trustee's name as Trustee or in the Trustee's own name, or in the name of the Trustee's nominee, or unregistered in such condition that ownership will pass by mere delivery.

15. *Dealing with Executor or Legal Representative*. To lend money to any person, including the probate estate of the Settlor, provided that any such loan shall be adequately secured and shall bear a reasonable rate of interest; and to purchase property at its fair value as determined by the Trustee in the Trustee's discretion, from the probate estate of the Settlor.

16. *Power to Adjust for Tax Consequences*. 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 the Trustee shall have the power to allocate the benefits among the various beneficiaries, and 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 of any investment or administrative decision that the Trustee believes has had the effect of directly or indirectly preferring one beneficiary or group of beneficiaries over others.

17. *Power to Withhold Payment if Conflicting Claims Arise*. To withhold from distribution, in the Trustee's discretion, at the time for distribution of any property in this Trust, without the payment of interest, all or any

part of the property, as long as the Trustee determines in the Trustee's discretion that such property may be subject to conflicting claims, to tax deficiencies, or to liabilities, contingent or otherwise, properly incurred in the administration of the Trust estate.

18. *Power to Employ Agents*. To employ any custodian, attorney, accountant, corporate fiduciary, or any other agent or agents to assist the Trustee in the administration of this Trust and to rely on the advice given by these agents. 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.

B. The foregoing powers, duties, and discretions set forth in this Article shall be exercised in a fiduciary capacity only and shall be undertaken to the extent and under such terms and conditions as the Trustee, in the Trustee's discretion, deems advisable and proper, exercising the discretion a prudent person would use in the management of property held for the benefit of others.

ARTICLE IX
TRUSTEE DUTIES; LIMITATIONS ON DUTIES

A. *Duties of Trustee.* Except as expressly provided in this document, the Trustee has the duties imposed by law, including statutory duties to give notice and copies of this document to Trust beneficiaries and heirs at law on the death of the Settlor, and the duty to invest property in accordance with the Uniform Prudent Investor Act.

B. *Accounting*. During the Settlor's lifetime, the Trustee shall account only to the Settlor. After the Settlor's death, the Trustee shall render an account to each beneficiary entitled to current distribution out of income or principal in the Trustee's discretion.

There need be no physical segregation or division of the various trusts created under this Trust, if any, 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.

C. *Notices*. Unless the Trustee has received actual written notice of any event affecting any beneficial interests, the Trustee shall not be liable to any beneficiary of this Trust for distribution made as though the event had not occurred.

ARTICLE X
RULES OF CONSTRUCTION

A. *Applicable Law*. The validity of this Trust and the construction of its beneficial provisions shall be governed by the laws of the State of California as amended from time to time.

B. *Context.* The divisions, paragraphs, and subparagraphs of this document shall be construed in context, giving due regard to the headings and the topic of discussion.

ARTICLE XI
MISCELLANEOUS

A. *Protection from Claims*. No interest in the principal or income of any trust created under this document shall be anticipated, assigned, encumbered, or subjected to any creditor's claim or legal process, before actual receipt by the beneficiary.

B. *Heirs Intentionally Omitted*. Except as otherwise provided in this Trust and the Settlor's Will signed this day and bearing the same date as this Trust, the Settlor has intentionally and expressly omitted to provide for any other of Settlor's heirs living at the date of Settlor's death.

C. *Severability Clause*. If any provision of this Trust document is unenforceable, the remaining provisions shall nevertheless be carried into effect.

D. *Merger*. Notwithstanding the fact that the same person or persons may be both Trustee and beneficiary of this Trust and any trusts created under it, the trusts shall not merge, or be deemed to have merged, or fail

under any principle of law or equity.

E. *Generic Terms*. As used in this document, the masculine, feminine, or neuter gender, and the singular or plural number, each shall be deemed to include the others whenever the context so indicates.

ARTICLE XII
REVOCATION AND AMENDMENT

A. *Revocation*. The Settlor may at any time revoke this Trust in whole or in part by a written document signed by the Settlor and delivered to each then-acting Trustee of the Trust other than the Settlor. On revocation, the Trustee shall deliver the revoked portion of the Trust assets to the Settlor, or as the Settlor directs, within thirty (30) days of receipt of the notice of revocation. If the Settlor revokes this Trust entirely or with respect to a major portion of the assets subject to the Trust, the Trustee may retain sufficient assets reasonably to secure payment of liabilities lawfully incurred by the Trustee in the administration of the Trust, including Trustee's fees that have been earned but not paid, unless the Settlor agrees to indemnify the Trustee against these expenses.

B. *Amendment*. The Settlor may at any time amend any of the terms of this Trust by a written document signed by the Settlor and delivered to each then-acting Trustee of the Trust other than the Settlor. No amendment that substantially increases the Trustee's duties or liabilities or changes the Trustee's compensation will be valid without the Trustee's consent. The Trustee will not be obligated to act under such an amendment unless the Trustee accepts it. If the Trustee is removed for refusal to accept one or more amendments, the Settlor will pay the Trustee any sums due and indemnify the Trustee against liability lawfully incurred by the Trustee in administering the Trust.

C. *Powers Personal to Settlor*. The powers of the Settlor to revoke or amend this document are personal to Settlor and shall not be exercisable on Settlor's behalf by any conservator or other person, except that the court that appointed the conservator may, after notice to the Trustee, authorize revocation or amendment. This limitation, however, does not apply to the Settlor's agent under a durable power of attorney, who may exercise the power to revoke or amend this Trust as long as the agent is authorized to do so under the power of attorney instrument.

D. *Irrevocability*. On the death of the Settlor, this Trust shall become irrevocable and not subject to amendment.

Executed at Sacramento, California, on _ _[*date*]_ _.

__[*Signature*]__
MARY R. SMITH
Settlor and Trustee

ACKNOWLEDGMENT

State of California)
County of Sacramento)
_____)

On _ _[*date*]_ _, before me, _ _[*name*]_ _, Notary Public for the State of California, personally appeared MARY R. SMITH, who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) 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.

__[*Signature of officer*]__ [*Officer's Seal*]

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Source: Estate Planning/Complete Plans for Small and Mid-Size Estates/9 Plan for Unmarried Person Without Children/§9.39 B. Form: Schedule A

§9.39 B. Form: Schedule A

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Description of document:

This is a sample Schedule A for the Mary R. Smith Trust. It is based on the hypothetical in this chapter. For an additional sample schedule of assets, see Drafting California Revocable Trusts, chap 5 (4th ed Cal CEB 2003).

9.39-1 Sample schedule of trust assets

SCHEDULE A: TRUST ASSETS OF MARY R. SMITH TRUST

1. *Personal Property:*

All jewelry, clothing, household furniture and furnishings, sculpture, art, china, glassware, silverware, and all other tangible articles of a personal nature belonging to the Settlor or Settlor's interest in such property, normally kept at the Settlor's place of residence

2. *Real Property:*

Residential real property located at 123 Main Street, Sacramento, California 95825

3. *Bank Accounts:*

Savings account no. _____ at WF Bank

4. *Brokerage Accounts:*

ABC Brokerage Firm account no. 34567

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Source: Estate Planning/Complete Plans for Small and Mid-Size Estates/9 Plan for Unmarried Person Without Children/§9.40 C. Form: Certification of the Mary R. Smith Trust

§9.40 C. Form: Certification of the Mary R. Smith Trust

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Description of document:

This certification of trust is based on the hypothetical in this chapter. For additional discussion and sample form, see Drafting California Revocable Trusts, chap 22 (4th ed Cal CEB 2003).

9.40-1 Sample certification of trust

CERTIFICATION OF THE MARY R. SMITH TRUST

NAME OF TRUST: MARY R. SMITH TRUST

DATE OF TRUST: _ _[*date*]_ _

TAXPAYER IDENTIFICATION NUMBER: 333-22-4444

SETTLOR: MARY R. SMITH

INITIAL TRUSTEE: MARY R. SMITH

FIRST SUCCESSOR TRUSTEE: BARBARA SMITH

POWERS OF TRUSTEE: Attached is a true and correct copy of the portion of the Trust document which lists the powers of the Trustee.

FORM OF TITLE TO TRUST ASSETS: Title to Trust assets should be taken in the following form: "MARY R. SMITH, and successors in trust, as Trustee of the MARY R. SMITH TRUST."

REVOCABILITY OF TRUST: The Trust is revocable. The person holding the power to revoke the Trust is the Settlor identified above.

REVOCATION, MODIFICATION, OR AMENDMENTS: The Trust has not been revoked, modified, or amended in any manner that would cause the representations contained herein to be incorrect.

SIGNATURE OF ALL ACTING TRUSTEES: This Certification of Trust has been signed by the sole currently acting Trustee of the Trust.

RELIANCE ON THIS CERTIFICATION: This Certification of Trust is presented in lieu of a copy of the Trust instrument to establish the existence and/or terms of the Trust and is made in accordance with California Probate Code §18100.5 and California Commercial Code §8403(4)-(6). Any transaction entered into by a person acting in reliance on this Certification of Trust shall be enforceable against the Trust assets. Probate Code §18100.5(h) provides that, except for requests for excerpts of Trust provisions designating the Trustee and the Trustees' powers, any person who refuses to accept this Certification in lieu of the original Trust document will be liable for damages, including attorney fees, incurred as a result of that refusal, if the court determines that the person acted in bad faith in requesting the Trust document.

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

DATED: _ _[*date*]_ _

__[*Signature*]__

MARY R. SMITH

CERTIFICATE OF ACKNOWLEDGMENT OF NOTARY PUBLIC

[*See §9.38 for form of Acknowledgment*]

Comment: An attachment that contains copies of the pages of the trust that set out the trustee powers should be added to the certification. Some financial institutions require a specific form of trust certification for their transactions; other institutions may require a customized certification.

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Source: Estate Planning/Complete Plans for Small and Mid-Size Estates/9 Plan for Unmarried Person Without Children/§9.41 D. Form: Will of Mary R. Smith

§9.41 D. Form: Will of Mary R. Smith

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▶ To download **WordPerfect** version, right click and choose *Save Target As*

Description of document:

After making a specific gift, this pourover will transfers the residue of the testator's estate to the trustee of the trust. In the typical revocable trust estate plan, the testator transfers all major assets to the trust during life. The will functions as a safeguard, sweeping into the trust assets inadvertently not transferred to the trust.

WARNING: This form is a sample based on the hypothetical in this chapter only. It is provided by the authors and is not constructed from forms in CEB drafting books. It has been modified to follow the format of the wills in California Will Drafting (3d ed Cal CEB 1992). The drafter should refer to the text of Will Drafting before preparing any document.

References: As an aid to the reader, the following list contains cross-references to chapters in Will Drafting that contain additional sample provisions and discussion of how they should be used. See also Drafting California Revocable Trusts, chap 22 (4th ed Cal CEB 2003).

Topic	*Will Drafting Chapters*
Introductory clauses	10
Revocation of prior will	9
Gifts of property	8
Nomination of executor	32
Executor powers and duties	33
Execution	36

9.41-1 Will of Mary R. Smith

WILL OF MARY R. SMITH

I, MARY R. SMITH, also known as Mary Renee Smith and Mary Smith, a resident of the County of Sacramento, State of California, and a citizen of the United States, declare that this is my Will.

INTRODUCTION: FAMILY

1. *Revocation.* I revoke all Wills and Codicils that I have previously made.

2. *No Spouse or Partner*. I am not married and I do not have a registered domestic partner as of the date of this Will.

3. *Children and Issue*. I have no children, living or deceased, as of the date of this Will.

4. *No Contract to Make a Will*. I have not entered into a contract to make a Will or not to revoke a Will.

DISPOSITION OF ESTATE

5. *Gift of Personal Property*. I give any automobile I own at the time of my death to my niece, DEBORAH SMITH, if she survives me for thirty (30) days, and if she does not, then this gift shall lapse.

6. *Disposition of Residue to Trust*. I give the residue of my estate, excluding property over which I have a power of appointment, to my sister, BARBARA SMITH, or any Successor Trustee, as Trustee of the MARY R. SMITH Trust established on _ _[*date*]_ _, of which I am the Settlor, and I direct that the residue of my estate shall be added to and administered and distributed by the Trustee, according to the terms and conditions of that Trust, including any amendments made to it before my death. It is my intent, if it is permissible, not to create a separate trust by this Will or subject either that Trust or the property added to it by this paragraph to the jurisdiction of the probate court.

7. *Alternate Disposition*. If at the time of my death the residue of my estate is not permitted by law to be distributed to the Trustee, or if the Trust is not then in existence, is revoked after the date of my Will, or fails for any reason, I hereby incorporate by reference the terms of that Trust existing on the date I signed my Will, without giving effect to any amendments made subsequently, and I give the residue of my estate to the Trustee named in the Trust as Trustee, to be held, administered, and distributed according to the Trust terms incorporated in my Will.

NOMINATION OF EXECUTOR; POWERS

8. *Nomination of Executor*. I nominate my sister, BARBARA SMITH as Executor of this Will.

Should BARBARA SMITH for any reason fail to qualify or cease to act as Executor, I nominate my friend, CYNTHIA SHIPP as Executor of this Will.

Should CYNTHIA SHIPP for any reason fail to qualify or cease to act as Executor, I nominate my brother ANDREW SMITH as Executor of this Will.

The term "my Executor" as used in this Will shall include any personal representative of my estate. I direct that no bond be required of any Executor named in this Will.

9. *Investment Power*. I authorize my Executor to invest and reinvest any surplus moneys in the Executor's hands in any kind of property, real, personal, or mixed, provided, however, that the Executor shall be limited to investing no more than 30 percent in stock funds, specifically limited to stock index funds. The balance of the investment portfolio shall be invested in United States Treasury bills, notes, and bonds, conservative domestic bond index funds, money market mutual funds, and certificates of deposit. The Executor shall not have the power to invest on margin or to invest in futures contracts or call and put options.

10. *Power to Sell Estate Property*. I authorize my Executor to sell, with or without notice, at either public or private sale, any property belonging to my estate, subject only to such confirmation as may be required by law.

11. *Powers of Independent Administration.* My Executor may administer my estate under the California Independent Administration of Estates Act (Probate Code §§10400-10592).

I subscribe my name to this Will on _ _[*date*]_ _, at _____, California.

__[*Signature*]__
MARY R. SMITH

On the date written below, MARY R. SMITH declared to us, the undersigned, that this instrument, consisting of three (3) pages, including the page signed by us as witnesses, was her Will, and requested us to act as witnesses to it. She then signed this Will in our presence, all of us being present at the same time. At the time, MARY R. SMITH appeared of sound mind. Neither of us has any knowledge of any facts indicating that this instrument was procured from her by duress, menace, fraud, or undue influence. We now, at the request of and in the presence of MARY SMITH and in the presence of each other, subscribe our names as witnesses.

We declare under penalty of perjury under the laws of the state of California that the foregoing is true and correct.

__[*Signature of witness*]__
_ _[*Typed name*]_ _

__[*Signature of witness*]__
_ _[*Typed name*]_ _

_ _[*Address*]_ _ _ _[*Address*]_ _

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Source: Estate Planning/Complete Plans for Small and Mid-Size Estates/9 Plan for Unmarried Person Without Children/§9.42 E. Form: Financial Uniform Statutory Form Power of Attorney

§9.42 E. Form: Financial Uniform Statutory Form Power of Attorney

▶ To download **Word** version, right click and choose *Save Target As*

▶ To download **WordPerfect** version, right click and choose *Save Target As*

Description of document:

This financial uniform statutory form power of attorney also provides for limitations on investment choices (see §9.32), personal and family maintenance powers (see §9.28), and conservator nomination (see §9.30).

WARNING: This form is a sample based on the hypothetical in this chapter. The drafter should refer to the text of California Powers of Attorney and Health Care Directives (Cal CEB 2008) before preparing a durable power of attorney. For financial management and personal care issues and forms, see Powers of Attorney, chaps 4-6; for nomination of conservator, see Powers of Attorney §§5.44-5.45.

9.42-1 Financial uniform statutory form power of attorney

FINANCIAL UNIFORM STATUTORY FORM POWER OF ATTORNEY

(California Probate Code Section 4401)

NOTICE: THE POWERS GRANTED BY THIS DOCUMENT ARE BROAD AND SWEEPING. THEY ARE EXPLAINED IN THE UNIFORM STATUTORY FORM POWER OF ATTORNEY ACT (CALIFORNIA PROBATE CODE SECTIONS 4400-4465). IF YOU HAVE ANY QUESTIONS ABOUT THESE POWERS, OBTAIN COMPETENT LEGAL ADVICE. THIS DOCUMENT DOES NOT AUTHORIZE ANYONE TO MAKE MEDICAL AND OTHER HEALTH-CARE DECISIONS FOR YOU. YOU MAY REVOKE THIS POWER OF ATTORNEY IF YOU LATER WISH TO DO SO.

I, MARY R. SMITH, 123 Main Street, Sacramento, California 95825, appoint CYNTHIA SHIPP, 456 Oak Street, Sacramento, California 95825, as my Agent (attorney-in-fact) to act for me in any lawful way with respect to the following initialed subjects.

TO GRANT ALL OF THE FOLLOWING POWERS, INITIAL THE LINE IN FRONT OF (N) AND IGNORE THE LINES IN FRONT OF THE OTHER POWERS.

TO GRANT ONE OR MORE, BUT FEWER THAN ALL, OF THE FOLLOWING POWERS, INITIAL THE LINE IN FRONT OF EACH POWER YOU ARE GRANTING.

TO WITHHOLD A POWER, DO NOT INITIAL THE LINE IN FRONT OF IT. YOU MAY, BUT NEED NOT, CROSS OUT EACH POWER WITHHELD.

INITIAL		
MRS	**(A)**	**Real property transactions.**
MRS	**(B)**	**Tangible personal property transactions.**
MRS	**(C)**	**Stock and bond transactions.**
_____	**(D)**	**Commodity and option transactions.**
MRS	**(E)**	**Banking and other financial institution transactions.**
_____	**(F)**	**Business operating transactions.**
MRS	**(G)**	**Insurance and annuity transactions.**
MRS	**(H)**	**Estate, trust, and other beneficiary transactions.**

MRS	**(I)**	**Claims and litigation.**
MRS	**(J)**	**Personal and family maintenance.**
MRS	**(K)**	**Benefits from Social Security, Medicare, Medicaid, or other governmental programs, or civil or military service.**
MRS	**(L)**	**Retirement plan transactions.**
MRS	**(M)**	**Tax matters.**
_____	**(N)**	**ALL OF THE POWERS LISTED ABOVE.**

YOU NEED NOT INITIAL ANY OTHER LINES IF YOU INITIAL LINE (N).

SPECIAL INSTRUCTIONS

ON THE FOLLOWING LINES YOU MAY GIVE SPECIAL INSTRUCTIONS LIMITING OR EXTENDING THE POWERS GRANTED TO YOUR AGENT.

The Principal gives her Agent the following additional powers and instructions:

1. To fund with the Principal's property a trust whether or not created by the Principal or a person authorized to create a trust on behalf of the Principal.

The Principal is conservative in her investment decisions and the Agent shall be limited to investing no more than 30 percent in stock funds, specifically limited to stock index funds. The balance of Principal's investment portfolio shall be invested in United States Treasury bills, notes and bonds, conservative domestic bond index funds, money market mutual funds, and certificates of deposit. The Agent shall not have the power to invest on margin or to invest in futures contracts or call and put options.

2. To request the Trustee of the MARY R. SMITH Trust to pay for costs incurred by the Agent in exercising personal and family maintenance powers during any period in which the Principal becomes incompetent to direct distributions or other use of property.

3. To establish one or more Individual Retirement Accounts (IRAs) and employee benefits plans (including a plan for a self-employed individual) on the Principal's behalf, to contribute to any IRA or plan held in the Principal's name, to roll over or direct transfers of plan benefits into other retirement plans or IRA accounts at the same company or at another company, to manage the accounts, to withdraw from any account amounts that may be necessary for the health, maintenance, and support of the Principal, to select or change payment options and to apply for and make any elections under any IRA or employee benefit plan in which the Principal is a participant, including elections required for payment of any and all types of employee benefits to which the Principal may be entitled, to take possession of all such benefits, and to distribute such benefits to or for the benefit of the Principal. The Agent shall not have the power to designate and change beneficiaries.

Should CYNTHIA SHIPP be unable or unwilling to act as the Agent as determined by either:

(a) The death of CYNTHIA SHIPP;

(b) The resignation in writing of CYNTHIA SHIPP; or

(c) The written certification by a licensed physician that CYNTHIA SHIPP has become physically or mentally incapacitated whether or not a court of competent jurisdiction has declared CYNTHIA incapacitated, mentally ill, or in need of a conservator;

Then I designate and appoint BARBARA SMITH as Agent (attorney-in-fact).

If it becomes necessary to appoint a conservator of the person and/or estate for me, I nominate the following individual to act as the conservator of my person and/or estate: my sister, BARBARA SMITH, who resides at 789 Elm St., Concord, California 94529, and if she is unable or unwilling to act, then I nominate CYNTHIA SHIPP, who resides at 456 Oak Street, Sacramento, California 95825.

UNLESS YOU DIRECT OTHERWISE ABOVE, THIS POWER OF ATTORNEY IS EFFECTIVE IMMEDIATELY AND WILL CONTINUE UNTIL IT IS REVOKED.

This power of attorney will continue to be effective even though I become incapacitated.

STRIKE THE PRECEDING SENTENCE IF YOU DO NOT WANT THIS POWER OF ATTORNEY TO CONTINUE IF YOU BECOME INCAPACITATED.

EXERCISE OF POWER OF ATTORNEY WHERE MORE THAN ONE AGENT DESIGNATED

If I have designated more than one agent, the agents are to act
_____ *NOT APPLICABLE*_____ .

_____
Initial

IF YOU APPOINTED MORE THAN ONE AGENT AND YOU WANT EACH AGENT TO BE ABLE TO ACT ALONE WITHOUT THE OTHER AGENT JOINING, WRITE THE WORD "SEPARATELY" IN THE BLANK SPACE ABOVE. IF YOU DO NOT INSERT ANY WORD IN THE BLANK SPACE, OR IF YOU INSERT THE WORD "JOINTLY" THEN ALL OF YOUR AGENTS MUST ACT OR SIGN TOGETHER.

I agree that any third party who receives a copy of this document may act under it. A third party may seek identification. Revocation of the power of attorney is not effective as to a third party until the third party has actual knowledge of the revocation. I agree to indemnify the third party for any claims that arise against the third party because of reliance on this power of attorney.

Signed on _ _[*date*]_ _, at _ _[*city*]_ _, California.

__[*Signature*]__
MARY R. SMITH

BY ACCEPTING OR ACTING UNDER THE APPOINTMENT, THE AGENT ASSUMES THE FIDUCIARY AND OTHER LEGAL RESPONSIBILITIES OF AN AGENT.

CERTIFICATE OF ACKNOWLEDGMENT OF NOTARY PUBLIC

[*See §9.38 for form of Acknowledgment*]

Comment: Some practitioners provide the principal, and in some cases the agent, with copies of the Probate Code sections that describe the powers identified with the terms used in the uniform durable power of attorney form. See Prob C §§4400-4465.

Although it is necessary only to initial the items your client wants, some practitioners think it prudent also to strike out portions not wanted.

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§9.43 F. Advance Health Care Directive

The California Medical Association (CMA) Advance Health Care Directive form pages i-iv contain a very clear and concise summary of the directive and its function. On page 1 of the form, item 1, Mary will check Option A and print her full name, Mary R. Smith. Although the form asks for the principal's date of birth, it is not required. On page 2, Mary will appoint her sister Barbara Smith as her agent and fill in her sister's contact information. On the bottom of the page, under "OPTIONAL," Mary will name Cynthia Shipp as her alternate agent and insert her contact information. Nothing needs to be filled in on page 3. On page 4, as discussed in the interview, Mary is adamant about not wanting to be kept alive by machines, so she should sign OPTIONAL statement 5.A.

In item 5 under OPTIONAL (other or additional statements), Mary should add the following: "I direct that my remains be cremated and that my ashes be scattered at sea."

On page 5, Mary should draw a line through item 6 (Organ and Tissue Donation) and initial the strike-through.

When Mary takes the form to the final appointment with her attorney, the attorney should review it to make sure that it has been filled out correctly. Mary can then sign the form in front of two witnesses in the attorney's office when she signs her other estate planning documents.

The CMA Advance Health Care Directive kit may be purchased by calling 800-882-1262; by sending a fax to 415-882-5195; by ordering online from the CMA Bookstore at http://www.cmanet.org/bookstore; or by mailing the request, with payment, to CMA Publications, 1201 J Street, Suite 375, Sacramento, CA 95814-2906. Prepayment by check or credit card is required. The kit, including the form, is available in English and Spanish.

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§9.44 G. Form: Transmittal Letter to Client

▶ To download **Word** version, right click and choose *Save Target As*

▶ To download **WordPerfect** version, right click and choose *Save Target As*

Description of document:

The draft documents should be prepared and sent to Mary along with a transmittal letter. The documents should be mailed to her so that she has enough time to review them carefully before her final appointment with the attorney. Questions should be answered and changes made before the documents are executed at the appointment.

WARNING: This form is a sample based on the hypothetical in this chapter. The transmittal letter should be tailored to the documents drafted and to the client's concerns, pointing out any unusual provisions. It should include any warnings that the attorney wants to emphasize.

9.44-1 Transmittal letter to client

[*Attorney's letterhead*]

_ _[*Date*]_ _

Mary Smith
123 Main Street
Sacramento, California 95825

Dear Mary,

Enclosed are drafts of the following instruments that we have prepared along the lines I discussed with you in our offices on _ _[*date*]_ _:

(1) Your revocable Trust instrument;

(2) Your "pourover" Will;

(3) Your durable power of attorney; and

(4) A grant deed conveying your home into the revocable Trust.

Please review these drafts very carefully to make sure that you understand the provisions and that the documents accurately reflect your wishes. Pay special attention to those provisions in which you name your beneficiaries and your fiduciaries. Check the spelling of all names for accuracy. Make sure that the draft contains the limitations on the powers of your fiduciaries that you wanted to include, such as the limitation on investment choices. As I explained in our interview, there may be a time when it would be most prudent to have more than 30 percent of your brokerage account in stock funds, and you could allow greater flexibility while still including a statement of your preference for continuing to invest very conservatively. You confirmed to me in our interview that you wanted to retain the more stringent limitations. I would urge you to reconsider the investment limitation provision.

The pourover Will provides for distribution of your car to your niece and distributes anything else that the Will governs at the time of your death to the Trust.

As you read through the documents, mark anything that is incorrect or that you wish to change and also mark provisions that you do not understand so we can review them at our next meeting before the documents are signed.

Some of the general provisions in your Trust, Will, and power of attorney may not apply to your situation at

this time, but I would prefer to leave them in the documents in the event a subsequent amendment or a change in circumstances makes them applicable later on. Examples in the Trust include the power to continue a business, to manage securities, to comply with restrictions in certain types of property interests, and to act as a partner (Art VIIIA #1, 8, 9, and 11), and references to multiple trusts in IXB and XID.

I am also enclosing a printed Advance Health Care Directive kit, published by the California Medical Association, for you to read and fill out. You said in our interview that you want to designate Barbara, then Cynthia, as your health care agent, to serve in that order of priority, to make health care and other personal decisions for you in the event you are unable to make them yourself. You should initial the statement regarding life support that reflects your wishes and also draw a line through the organ donation section and initial the cross-out to indicate that you do not wish to be a donor. The directive can be executed at the same time as the other instruments if you would like to do so. Please bring the form with you to our next meeting.

Also enclosed are copies of your personal and family information sheets and schedules of your significant assets and liabilities as of the present time. Please also review these forms very carefully and advise me of any errors or omissions. It is important that they be as complete and accurate as reasonably possible to ensure that your estate plan will be effectively implemented.

Sincerely,
__[*Signature of attorney*]__
_ _[*Typed name*]_ _

Enclosures

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10

Plan for Unmarried Person With Minor Children

Mary K. Vo
Donald L. Scoggins

I. THE HYPOTHETICAL: UNMARRIED PERSON WITH MINOR CHILDREN
- A. The Client: Jane Johnson §10.1
- B. The Client's Assets §10.2
- C. Determining Client's Goals and How to Achieve Them §10.3
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II. FORMS §10.30
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- B. Form: Jane Johnson Trust §10.32
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- D. Form: Pourover Will §10.34
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- F. Form: Advance Health Care Directive §10.36
- G. Form: Transmittal Letter to Client §10.37

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I. THE HYPOTHETICAL: UNMARRIED PERSON WITH MINOR CHILDREN

§10.1 A. The Client: Jane Johnson

Let's assume that the client is Jane Johnson, who is 38 years old. She has two minor children, Andrew Johnson, age 10, and Amy Johnson, age 8. Jane was married to the children's father, James Johnson, for 4 years and the marriage ended in divorce 6 years ago. Jane is employed as a dental hygienist and earns approximately $67,000 per year. She lives in a Los Angeles neighborhood with good public elementary schools. Her only significant debt is the mortgage on her condominium. Her monthly mortgage payment is approximately $2700.

Jane shares custody of her two children with James. She no longer receives spousal support but does receive child support. In addition, Jane and James's marital settlement agreement, incorporated into the final judgment of dissolution, includes a provision requiring James to maintain a life insurance policy with a payout of $500,000 at his death, payable to Amy and Andrew under a trust created by James.

Jane's parents are both living and are still married to each other. Her father, Michael Jones, is 68 years old and her mother, Karen Jones, is 65 years old. Her father is retired; her mother works part time because she enjoys it, not because of financial need. Jane's parents are financially comfortable and have made a number of annual monetary gifts to Jane and their other daughter. They live in the same city as Jane and see their grandchildren regularly.

Jane has one younger sister, Jocelyn Carson, who is 35 years old. Jocelyn lives in Santa Barbara, California, and is married to Max Carson. They have no children. Jane is emotionally close to Jocelyn. She likes Max but has only known him for a little more than the 2 years he and Jocelyn have been married. Because of the distance between their homes, Jane does not see them often. Jocelyn and Max have jobs that require them to travel, often out of state.

Jane's former husband, James Johnson, works with his father in the family business. They are insurance agents. He remarried, and he and his wife, Sharon, have one son, John, age 4. Jane is friendly with James and his wife. Sharon and John have a good relationship with Andrew and Amy, who spend weekends, alternating school holidays, and several weeks during the summer with their father and his new family.

Jane has known her best friend, Nancy Sims, since high school and sees her on a regular basis. Nancy also knows Jane's parents very well, having spent a lot of time at their home when she and Jane were in high school. Nancy is married to Michael Sims and they have one daughter, Audrey, who is 9 years old. Jane's children are close to Nancy and Mike and spend a lot of time with Audrey. Nancy and Mike are well off financially and live nearby.

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Source: Estate Planning/Complete Plans for Small and Mid-Size Estates/10 Plan for Unmarried Person With Minor Children/§10.2 B. The Client's Assets

§10.2 B. The Client's Assets

The following is a list of Jane's assets:

Title	Date Acquired & Basis (if applicable); Debt	Description of Asset/Interest	Approx. Current Value
Jane	Purchased for $400,000 in 1999 Mortgage is $450,000	Condominium located at 123 First St., Los Angeles, California [Received as part of divorce; value at time of divorce $500,000; Jane had to refinance condo at time of divorce to cash out James's share (small share because condo purchased shortly before divorce)]	$ 600,000
Jane		401(k): Beneficiary unknown	10,000
Jane and her father as joint tenants	Includes $10,000 gift from father	Bank interest-bearing savings account no. 123	19,000
Jane and her father as joint tenants		Bank checking account no. 456	5,300
Jane	$50,000 received as part of divorce settlement; augmented over the years by gifts from parents	Brokerage account	125,000
Jane		ABC Life Insurance Company policy; Beneficiaries: Andrew and Amy	600,000
Jane	2002	Vehicle: 2002 Ford Taurus	7,000
	Started by Jane's parents	Stamp collection	500
		Grandmother's china collection	2,000
		Grandfather's gold pocket watch	Sentimental value
		Great-grandfather's antique solid oak desk	2,000
		Furniture and furnishings, and personal effects	Nominal

		Total Fair Market Value	$1,370,800

The bank statements for her checking and savings accounts have both Jane's name and her father's name on title. Jane added her father's name to her account to give him instant access in case anything should happen to her. To give Jane a financial cushion in case of emergency, her father deposited $10,000 into her savings account after her divorce.

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§10.3 C. Determining Client's Goals and How to Achieve Them

Jane's desires are clear: She wants to provide for her children and make sure that they are taken care of if she dies while they are minors. The difficult issue for Jane will be deciding who should have the care and custody of the children if that should happen. She will also have to decide whether she wants to create a trust at this stage in her life and, if so, she must decide how to make her assets available for her children, given their different interests and needs, at what age each might be mature enough to handle their assets, and who will be responsible for the assets until that time.

For a discussion of the first steps in the estate planning process that apply in every case, see §§9.1-9.3. For a sample questionnaire that can be sent to Jane before her first meeting with the attorney, see chap 8.

ALERT: The gross value of Jane's assets (over $1 million) will be significant, and estate tax planning will be an issue unless before 2011 Congress passes a permanent estate tax exclusion amount that exceeds the value of Jane's assets. See §3.27 for discussion of the uncertain future of the estate tax. The attorney must explain this to Jane and determine whether Jane wishes to engage in any estate tax planning at this point. If Jane opts at this time not to reduce the size of her potentially taxable estate, the attorney should document Jane's decision. Absent a new law, if Jane were to die in 2010, Jane's estate would owe no tax, but if she were to die in 2011, and the planner could not show that the absence of tax planning was Jane's decision, Amy and Andrew might have a viable claim against the planner in the amount of any estate taxes due. The attorney should also explain to Jane that she should review her estate plan if at her parents' death she inherits significant assets.

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D. Formulating the Estate Plan for the Minor Children

1. Custody

§10.4 a. Effect of Joint Custody

Jane shares joint custody of the children with James. Initially there were some disagreements, but during the past 5 years they have been able to communicate and resolve disagreements without returning to court. Jane has a good relationship with James's current wife, Sharon, and is comfortable with the children spending time with their father and his new family. Jane's children are bonded to their half-brother, John, and enjoy their time with him.

The attorney should discuss with Jane the effect of joint custody on her estate plan. Because James has joint custody and his parental rights have not been terminated, if Jane is no longer able to care for her children (*e.g.,* due to incapacity) or dies before James, he will have full custody of the children. Jane's nomination of a guardian of the person of the children would not take effect. However, Jane's nominees could file a petition seeking their appointment as guardians if they believe that their appointment would be in the best interests of Amy and Andrew. Jane should understand that it is unlikely the court would appoint them over James's objections unless Jane's nominees could present enough evidence for the court to find that the best interests of Amy and Andrew could only be met by appointment of the nominees.

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§10.5 b. Guardian of the Person

Jane should give some thought to the possibility that James could die first or become unable to take care of the children or be judged unfit to care for them. It is also possible that, if Jane dies before James, he might still die before the children reach age 18. In either of these situations, her children would need a guardian of the person and the court would consider Jane's nominee.

Jane would like her children to live with family members. Although her parents are not in a position to assume this responsibility, her sister, Jocelyn, would be a good choice except that Jane questions whether it would be in her children's best interests to be moved to a new city. Also, Jocelyn's current job requires her to travel. Jane is not ready to name Max as a co-guardian because she doesn't know him well enough. Jocelyn and Max don't have any children yet, and Jane doesn't know what will happen if and when they do. Jocelyn and Max are becoming financially stable but do not yet own a house.

Nancy and Mike seem to be a better choice. They live in the same area as Jane, have a child in the same age group, and share similar values. If Nancy and Mike are named as co-guardians, the attorney should ask Jane what she would want to happen if one of them failed to qualify or ceased to act. Would the other act alone as sole guardian? Is it important that they act as guardians only if they are still married and act together? Before Jane makes a final decision, the attorney should advise her to talk to Nancy and Mike about being named as guardians.

James knows Nancy and Mike. He likes them both, but since the divorce he has not maintained contact with them. The attorney should advise Jane to discuss with James whom he would nominate to serve as guardian of the person for Andrew and Amy. If Jane and James agree on the guardian and successors, then each parent's estate plan should contain identical nominations. The attorney should explain that if they cannot agree, and each leaves a written nomination naming different persons, then the court would consider each parent's nomination before making its order based on the best interests of the child. Fam C §§3011(b), 3020, 3040(a); Prob C §1514. See California Guardianship Practice, chap 5 (Cal CEB Annual). Generally, once a child reaches the age of 14, or at any age if the court determines that the child is "of sufficient age and capacity to reason so as form an intelligent preference as to custody," the court must consider and give due weight to the child's wishes making its decision. Fam C §3042.

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§10.6 2. Guardian of the Estate

Because the children may need a guardian of the estate if they inherit property directly while under the age of 18—which is not foreseen as part of Jane's estate plan—Jane must decide whom to name as a guardian of the estate and whether the same person should be nominated as guardian of both the person and the estate.

For complete coverage of guardianship of the estate, see California Guardianship Practice (Cal CEB Annual).

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§10.7 3. Jane's Decisions

Jane finds it difficult to make a decision regarding guardianship of the person of her children, especially because there are so many future unknowns. The attorney should explain that, given her children's ages and her family situation, it would be difficult for Jane to plan for more than a few years. Accordingly, Jane should make decisions about the guardian based on what she knows today. Then she should review her estate plan on a regular basis to confirm whether the choices she is making now are still appropriate.

Jane decides that if her children were to need a guardian within the next few years (*i.e.,* if she and James both die or become incapacitated or for some other reason cannot fulfill their parental duties), Nancy and Mike would make the best guardians, provided that they are still married to each other during the length of the guardianship. Jane also wants Nancy and Mike to continue to live in the Los Angeles area so that Jane's parents will be able to continue to see their grandchildren regularly. If at any point Nancy and Mike file for dissolution, resign, move out of the city, or for any reason can no longer serve as co-guardians, Jane wants her sister, Jocelyn, to serve as guardian.

Even though Jane has told her attorney that Nancy and Mike are financially well off, Jane's attorney should still inform her that anyone who is appointed to serve as a guardian is entitled to compensation.

If Jocelyn chooses not to serve, *e.g.,* because she believes that it would not be in the children's best interests to relocate to a new city to live with her, or if for any reason she will no longer serve after accepting the appointment, then Jane wants Jocelyn to have the power to nominate another guardian to serve in Jocelyn's place. Jane is confident that Jocelyn would focus on the children's best interests, and plans to keep Jocelyn better informed about the children (their school activities, extracurricular activities, friends, and other developments).

Jane plans to discuss her nomination in detail with her parents. She does not want to hurt their feelings by not naming them as guardians. She also wants to make sure that Nancy and Mike understand that, if they are called on to serve, it will be important for them to maintain the children's regular contact with their maternal grandparents.

NOTE: The duties and responsibilities of the guardian of the person end when the child turns 18 (see Prob C §§1600-1601; Cal Rules of Ct 7.1004).

To ensure that there is coordinated management of all assets in her estate, Jane has decided to nominate her father as guardian of the estate, should one be required, with her mother and then her sister as the alternates.

For sample nomination form, see §10.31.

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Source: Estate Planning/Complete Plans for Small and Mid-Size Estates/10 Plan for Unmarried Person With Minor Children/ E. Formulating the Estate Plan for Asset Management and Distribution/ 1. Beneficiaries/§10.8 a. The Children

E. Formulating the Estate Plan for Asset Management and Distribution

1. Beneficiaries

§10.8 a. The Children

Jane wants all of her assets to go to her children, but wants to be able to "tie up" the money so that her children will not have access to all of it as soon as they turn 18. Given the size of Jane's estate and the age of her children, the attorney should explain to Jane that a trust would be the best solution because it would allow Jane to set forth a plan to manage the assets until her children receive final distribution and to decide for what purposes trust funds can be used. The attorney should ask Jane to decide:

- When her estate should be distributed to the children;
- Whether she would want the assets distributed in stages;
- Whether she would want her assets put into a family pot trust or divided into separate trusts for each child; and
- Whether she wants the attorney to draft a will with a testamentary trust or a revocable trust with a pourover will.

The attorney should explain all of these terms to Jane as part of the client conference.

In making her decisions, Jane will have to consider a number of factors. For example, the children have different needs and interests. Andrew needs braces. He is an honors student, likes to read, and participates in several school-sponsored sports activities. Amy is a good student, but many of her interests are extracurricular and require private lessons. She is a gifted violinist and martial arts student. Jane has concerns about her children's education after elementary school. She and her ex-husband purchased the condominium in an area known for its good public elementary and middle schools. However, Jane questions whether she would send her children to the local public high school; she thinks that she would probably choose a private high school instead.

Jane should also be asked about whether she wants to include in the definition of "children" adopted children, stepchildren, and foster children.

Jane is certain that she wants the trust assets kept in trust so that funds will be available to pay for her children's education through college or for acceptable vocational or other professional training. She is not sure when her children will be mature enough to receive final distribution of their remaining trust assets. Jane also wonders whether she should have trust provisions regarding distribution to her children for the purpose of starting a business or purchasing a house.

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§10.9 b. Contingent Beneficiaries

The attorney must point out to Jane that she should also name contingent beneficiaries. Jane, however, finds it difficult enough to make plans for her children in the event of her incapacity or death, and has not thought about what would happen if her children died before they received final distribution of their trust. Jane's initial response is that she would want to keep the trust assets in the family. Jane thinks first of her parents as contingent beneficiaries, but she knows that her parents have sufficient assets for their own care. (See discussion in chap 9 about leaving an estate to older beneficiaries.) Jane then thinks she will name Jocelyn as the contingent beneficiary.

As is sometimes true of a parent with young children creating an estate plan for the first time, Jane has not considered that her young children will grow up and that she might have become a grandmother by the time she dies. The attorney should point this out to Jane and suggest that she might want the children of a predeceased child, if there are any, to be the contingent beneficiaries in the event of the child's death.

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§10.9A c. Gifts From Grandparents

Jane's parents have discussed the possibility of making annual gifts to Jane's children to be used for their future education. Her parents have asked Jane whether they should fund college savings accounts (IRC §529 plans) for Andrew and Amy with the annual gifts and whether Jane's attorney could advise them.

Jane's attorney should not become involved in Jane's parents' estate planning, because of the potential for a conflict of interest. The attorney should tell Jane that there are many factors for her parents to consider before they start such a gifting plan. The attorney should advise Jane to tell her parents that they need to obtain independent advice from an attorney or financial planner knowledgeable about college savings plans. Although some features of such plans may be attractive to grandparents, careful analysis of the potential benefits and drawbacks is necessary.

PRACTICE TIP: One concern of grandparents regarding college savings accounts is who will control the accounts for their grandchildren on their incapacity or death. A trust may be the owner of the plan, which would allow provision for successor account owners. See IRC §529(b)(1)(A); Prop Treas Reg §1.529-1(c); IRC §7701(a)(1). However, there are some features of trust ownership that may be disadvantageous. See, *e.g.,* discussion in California Estate Planning §§21A.10, 21A.12 (Cal CEB 2002). If the grandparents decide to go ahead, their estate planner should include a provision in their trust giving the trustee specific power to invest in such plans. For discussion of 529 plans, see chaps 3, 7; California Estate Planning, chap 21A (Cal CEB 2002).

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§10.10 2. Will With Testamentary Trust or Revocable Trust

The attorney should discuss with Jane the difference between having a will with a testamentary trust and having a revocable trust. A will would become effective only at Jane's death, a probate would be required, and after probate the estate's assets would fund the testamentary trust for her children. The attorney should discuss the probate considerations described in §§9.8-9.10. In contrast, a revocable trust would be created immediately and Jane would transfer most of her assets into the trust. It would provide for management of the assets in the event of Jane's incapacity, would avoid probate of the assets in the trust, and would continue on for the benefit of her children until they reach the age when Jane directs that the remaining assets be distributed to them. If Jane decides on a revocable trust, the attorney should explain that he or she will also draft a pourover will that will provide for assets not in the trust and not distributed to the children or the trustee directly by beneficiary designation.

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§10.11 3. Jane's Decisions

After discussing the issues, Jane decides that she would like the attorney to draft a revocable trust and pourover will for her. See §§10.32, 10.34. She does not want her estate to go through the expense and time required for a probate. Also, Jane likes the idea that if she becomes incapacitated, the revocable trust will already be in place and her successor trustee can take over management of the assets for Jane and her children. In response to questions from her attorney, Jane wants to include in the definition of "children" and "issue" children adopted when they are minors, but not stepchildren, foster children, or adopted children who were adults at the time of their adoption.

She agrees that the condominium, brokerage account, household furniture, furnishings, specific items that she has inherited, and other personal effects will be transferred to the trust. The will will govern disposition of the car and any other items that are not in the trust or governed by a beneficiary designation (other than one naming "my estate" or one that by default passes to Jane's estate). See §10.34.

As another part of the estate plan, Jane will name the trustee of her trust as the beneficiary of the life insurance policy. The attorney recommends naming the children as beneficiaries of the 401(k) account, with a proviso that if a child is under age 22, the beneficiary will be a custodian for the child under the California Uniform Transfers to Minors Act (CUTMA) (Prob C §3900-3925). Currently, the benefits that would be payable to the children from Jane's 401(k) account are relatively modest.

The attorney should explain that naming the children as beneficiaries might require the creation of a guardianship of the estate if a child is a minor, but naming the trust as the beneficiary might introduce a level of administrative complexity, required under the IRS rules, that is not warranted for these assets. Jane's attorney should be knowledgeable about the rules governing designation of a trust as the beneficiary of 401(k)s, IRAs, and other types of retirement plans to which pre-tax dollars are contributed by the client, and should explain the rules to Jane in as much detail as the attorney thinks would be helpful. For discussion of the rules, see California Estate Planning, chap 21 (Cal CEB 2002) and §7.19. Naming the children and providing for a custodian if a child is a minor is a reasonable alternative at this time. Jane should be cautioned, however, that the beneficiary designation issue should be reexamined in the future if the value of these benefits increases significantly before the children reach the age of 22.

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§10.12 a. Trust Provisions While Jane Is Alive

While Jane is alive, she will continue to use her assets for her own needs and for the needs of her children, even if this results in spending more money for the benefit of one child. For example, Andrew's school and extracurricular activities are mostly provided as part of his public school education, while Amy's extracurricular activities involve expensive private classes.

If Jane becomes incapacitated, the successor trustee would have a duty to use Jane's assets to care for her and would also be responsible for discharging Jane's duty to support her children (after taking into account other resources such as their father's support) until they reach age 18. Jane wants her trustee to continue to provide for the health, support, maintenance, and education of her children until they reach age 22 if she is incapacitated. She wants the trustee to have discretion to pay to send the children to a private high school. For Jane's decisions about further provisions for her children, see §10.13.

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§10.13 b. Trust Provisions at Jane's Death

Jane tells the attorney that, if she dies before her children are 35, she wants her assets to be managed for them until they reach the age of 35, with partial distributions to them before they reach that age. Jane is reluctant to allow complete distribution of the assets at an earlier age; she thinks that many young people mature slowly and become financially responsible relatively late in their lives and she does not want her children to spend their inheritance before they have learned to manage their finances. Jane further has decided that at her death she wants her remaining assets to be divided into equal shares for her children and to retain the share of any child under the age of 35 in a separate trust. Jane does not want her successor trustee to struggle with decisions about distributing funds from a family pot trust, possibly spending significantly more for one child than for the other. Jane also knows that the children's father will be contributing to the support of the children, at least as long as they are minors. Even after the attorney has explained that separate trusts will entail administrative costs for each trust, based on the expected size of her estate, Jane is not dissuaded from her decision.

Jane wants the trustee to have discretionary authority to pay for a private high school education for her children. In addition, if any child attends college or seeks a postsecondary education, Jane wants the trust to pay for tuition, books, and campus housing, but only if the trustee, in the trustee's discretion, determines that the child is pursuing his or her education seriously. She also wants the trustee to have discretion to pay for a safe, reliable car and to maintain automobile insurance. Jane wants the trustee of each child's trust to distribute one-fourth of that child's trust assets to the child when the child reaches age 21, one-half of the trust assets as then constituted when a child reaches age 30, and the balance of the trust assets when the child reaches age 35. Jane does not want to include an additional provision allowing the trustee to make discretionary distributions to her children, *e.g.,* for the purpose of starting a business or making a down payment on a house; she feels that the partial distributions at ages 21 and 30 are sufficient.

If Andrew or Amy dies before Jane or before final distribution of his or her trust, Jane wants that child's share to be distributed to that deceased child's children (if any). If there are no children, then that deceased child's remaining trust share should be added to the surviving child's trust. If both of Jane's children die before final distribution and do not leave any children, then Jane wants her assets to be distributed to her sister Jocelyn, and if Jocelyn is not then alive, then in equal shares to Jocelyn's children, if any. Finally, if Jocelyn is not alive and does not leave any surviving children, the trust assets would go to Jane's parents in equal shares, and if neither parent is then alive, Jane wants the assets to go to Nancy and Mike's daughter, Audrey. Other than her children's shares, the trustee should distribute the share of any other beneficiary who is under the age of 21 at the time of distribution to a custodian (to be chosen by the trustee) under the California Uniform Transfers to Minors Act.

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§10.14 4. Division of Responsibilities

The attorney will prepare a deed transferring title to the condominium to the trustee of the trust and a Preliminary Change of Ownership Report (PCOR). After the trust has been established and the deed signed and notarized, the attorney will have the deed recorded and the PCOR delivered to the recorder's office (together with the deed) to be forwarded to the assessor's office. The attorney will obtain stamped copies for his or her own records to show that the deed has been recorded, but will have the original returned to the client once it is processed by the recorder's office.

The attorney will also prepare a document assigning Jane's household furniture, furnishings, and personal effects to the trustee of the trust. See §10.33.

Jane will be responsible for obtaining the papers necessary to transfer title to the brokerage account to the trust. She is told that she should bring those papers with her when she comes to the office to sign all of the estate planning documents.

Jane is told that she and her father need to discuss the joint tenancy designation on her checking and savings accounts. Because Jane keeps very little money in the checking account (enough to pay monthly bills), she does not plan to change title. She also does not plan to change title to the savings account. However, the attorney should tell Jane that if she dies before her father, the funds would belong to her father and would not go to her children. The attorney should advise Jane that if she opens a new account and plans to keep any significant amount in that account, she should take title in the name of the trust.

Jane will contact the plan administrator of her 401(k) plan and designate her children as the beneficiaries, with the proviso that if any child is under the age of 22 the beneficiary will be her father as custodian under the California Uniform Transfers to Minors Act for that child. Her mother, Karen, should be named as the successor custodian.

For complete discussion of implementing the estate plan, with sample forms, see chap 12.

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§10.15 5. Who Will Control Jane's Assets

While Jane is alive and has capacity, she will retain total control of her assets and estate management. If at some point she no longer has legal capacity to handle her own affairs (see chap 2; §9.20), fiduciaries she has named in her estate planning documents will become responsible for managing her assets for her benefit and for the benefit of her children. For assets that are included in the trust, the successor trustee will become responsible.

For assets outside the trust, such as the 401(k) and the bank account, the responsible fiduciary will be the person Jane has named as her agent under a power of attorney for asset management. (Jane's attorney should explain who would have authority over the joint tenancy bank accounts if Jane becomes incapacitated. See §9.29.) In addition, the agent will have the authority to take care of other management tasks, such as applying for any public benefits to which Jane might be entitled, preparing and filing tax returns for Jane, and initiating lawsuits on Jane's behalf or defending lawsuits against Jane on Jane's behalf. Because one of the main purposes of the power of attorney is to authorize the agent to act for Jane if she becomes incapacitated, the power of attorney will be durable, *i.e.,* it will be effective as long as Jane remains incapacitated.

Although it is not anticipated that it will be necessary to appoint a conservator of the person or the estate, the attorney should explain why Jane should nominate the person or persons of her choice. See §10.21.

At the conference with Jane, her attorney should explain that although different assets will be the responsibility of differently titled fiduciaries, the same person can be, but need not be, named to fill each of these roles. She should also understand that although the responsibilities of the successor trustee will continue after Jane dies, the power of attorney will terminate automatically at her death. Usually the person who is to be named as successor trustee of a revocable trust and the executor of the person's will is the same person who will act as agent under a power of attorney and be nominated as conservator of the estate, even if not nominated as the conservator of the person.

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Source: Estate Planning/Complete Plans for Small and Mid-Size Estates/10 Plan for Unmarried Person With Minor Children/§10.16 a. Choosing Successor Trustee, Agent, Executor, and Conservator

§10.16 a. Choosing Successor Trustee, Agent, Executor, and Conservator

Jane states that she wants the same person to act as her successor trustee, agent under the power of attorney, executor, and conservator of the estate. Initially, Jane says that she would want her parents to act as her fiduciaries because Jocelyn does not live in the same city. However, Jane is worried about their age, and wonders what would happen if they could not manage the assets. Because the trust for Andrew and Amy will remain until each child is 35, it is likely that by that time one or both parents will have died or no longer be able or interested in serving as the trustee.

Jane asks whether it is a good idea to name the same person as her successor trustee, agent under the power of attorney, and guardian of the person for the children. The attorney should point out that one benefit of naming different people is that they can act as a check-and-balance system. If Jane names different people, she should name people who can communicate with each other. She thinks that even if Nancy and Mike are willing to be the guardians of the person for her children, they may not want to assume responsibility for her finances.

If Jane cannot decide on fiduciaries because every choice has drawbacks, the attorney can suggest that Jane consider naming a private professional fiduciary. Through careful screening, she should be able to identify an experienced, ethical private professional fiduciary and this alternative might work well. When Jane learns that the private professional fiduciary will charge the estate for his or her services, however, she is reluctant to consider this alternative.

NOTE: The attorney should tell Jane that the law provides that a person who serves as a fiduciary is entitled to compensation, which the person may decline. A successor trustee, agent under a power of attorney, conservator of the person or estate, and guardian of the person or estate, are all entitled to reasonable compensation; a person who is appointed as executor is entitled to compensation fixed by statute (see §§9.10, 9.31). This may not be a consideration with regard to a family member, but may be important to Jane if she wants to name non-family-members.

Jane asks if the attorney can serve. The attorney should explain to Jane that he or she does not act in those roles for clients. Jane wonders whether she should consider her accountant, but she dismisses this option because, although her accountant prepares her yearly return and therefore knows about her assets, he probably would not want to handle the day-to-day business of paying bills for her children.

Jane is most comfortable with the idea of having her family serve, because they know her children. She realizes that, although her family members will probably not take the fee, she wants them to have the option, especially if their fiduciary responsibilities extend over a period of years, either because of her incapacity or because the children's trusts have not yet terminated.

The attorney should also ask if Jane wants to include a trust provision requiring that any successor trustee post a bond, at least for the duration of her children's minority or any period(s) of incapacity. She should also consider whether she wants to include a provision that until both Amy and Andrew reach adulthood, the yearly accounting be delivered to a trusted adult who is not a successor trustee, such as her accountant, one of her parents, or James. The planner should explain to Jane that these are strategies to protect against the potential for abuse in any trust for the benefit solely of minors or the incapacitated.

For further discussion of considerations in selecting fiduciaries, see §§9.21-9.23.

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§10.17 b. Successor Trustee

The successor trustee will be responsible for managing the largest and most significant of Jane's assets if Jane becomes incapacitated or resigns, for managing the trust for her children after Jane's death, and for making final distribution. The attorney should explain these responsibilities to Jane and discuss the trust provisions that outline the powers and duties of the successor trustee. The attorney should also review what expenditures will be permissible for the children's benefit and in which areas, if any, Jane wants to limit the trustee's discretion.

The successor trustee must initially determine which assets are subject to the trust by checking the trust document and title to the assets. If Jane becomes incapacitated while the children are minors, the successor trustee will use Jane's assets to provide for her care and to discharge Jane's duty to support her minor children. At Jane's death, the successor trustee will administer the trust assets on behalf of Jane's children until each reaches the age of 35.

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§10.18 c. Agent Under Durable Power of Attorney

The attorney should explain that if Jane becomes incapacitated, her trustee will have authority to manage the assets held in her revocable trust on Jane's behalf, but assets outside of her trust will not be subject to the trustee's control and management. To ensure that all of Jane's assets are properly managed, the attorney should advise Jane that she will need a durable power of attorney for asset management. In this document, Jane can appoint an agent to manage or make decisions regarding assets that cannot or will not be owned by her trust, such as her qualified retirement plan accounts, life insurance, or small accounts.

In addition, Jane can designate her agent as the payee for Social Security in the event she becomes entitled to Social Security benefits. The agent can also perform the important task of transferring Jane's assets to her trust and avoiding a probate at her death in the event that Jane becomes incapacitated before the funding of her trust has been completed. Jane wants to authorize her agent to apply Jane's assets not only for Jane's benefit, but also for the benefit of her children.

For the reasons discussed in §10.14, Jane will keep title to her checking and savings accounts in joint tenancy with her father. The agent under the power of attorney will have authority over the bank accounts.

Jane's attorney usually uses an attorney-drafted power of attorney rather than the statutory form; the attorney-drafted form contains more detailed provisions. See §10.35.

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§10.19 (1) Springing or Immediately Effective Durable Power of Attorney

The attorney should discuss with Jane whether she wants the power of attorney, although valid from the time it is signed, to be a "springing power," that is, to become effective only when and if she becomes incapacitated or when some other triggering event occurs, *e.g.,* she reaches a certain age. Alternatively, the power of attorney may be made effective immediately from the time it is validly executed. The advantage of an immediately effective power of attorney is that it is usually easier to use with third parties because there is no need to prove that the triggering event, usually incapacity, has occurred. It is, however, riskier because it gives the agent immediate access to Jane's assets not in the trust and thus allows the possibility of abuse. For further discussion, see §9.25.

Based on her age, good health, and current circumstances, Jane is likely to decide on a springing power of attorney, not wanting to give immediate power over her affairs to anyone else. Jane will need to decide how her incapacity will be determined and by whom. Given Jane's age and good health, she may not want to place this decision in the hands of a doctor she does not see often, especially if she thinks her physician may be reluctant, overly cautious, or uncooperative. The attorney should explain that some clients are comfortable with a provision requiring a determination by two licensed physicians who have examined the client. However, this method can lead to delay and expense in obtaining the necessary certification of incapacity. The attorney should also present Jane with the alternative of naming a family member or friend to make the determination. Jane may even include a list of individuals, each of whom is authorized to make the determination.

For sample form with springing power, see §10.35.

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§10.20 (2) Personal Care Decision-Making Powers

A power of attorney may include powers regarding personal care decisions, such as the power to determine where the principal will live, to arrange the provision of meals, hire household employees, provide transportation, and handle mail, and to arrange recreation and entertainment. Prob C §4123(a), (c). The statutory form power of attorney contains the specific personal care powers set out in Prob C §4460. The personal care powers may alternatively be included in a power of attorney for health care (Prob C §4671(b)), in a separate document (Prob C §4123(a)), or in an attorney-drafted power of attorney for asset management (see §10.35) or revocable trust (see §10.32).

Even if these powers are included in Jane's trust, the attorney might consider including them in her durable power of attorney for asset management if the agent and the successor trustee are the same individuals. Including these powers in the power of attorney for asset management enables the agent to apply assets outside of the trust for the client's personal care.

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§10.21 d. Conservator

If Jane should become incapacitated and, *e.g.,* issues arise about which the agents under the powers of attorney have no authority to act, a conservatorship may be required, either to appoint a manager for her financial affairs (conservator of the estate for assets outside of her trust) or her personal care (conservator of the person). See Prob C §1801; §§7.11A, 7.64, 10.23. As part of the estate planning process, Jane should be encouraged to sign a nomination of conservator, which can only be done when she has legal capacity.

Jane may be alarmed at the thought that she might some day need a conservator. She may have a relative, friend, or neighbor for whom a conservator has been appointed, or she may have read articles about abuses by conservators. She may be worried that she might be caught up in a court proceeding that is public and that will involve a lot of paperwork and expense. The attorney should explain to her that the powers of attorney should avoid the need for a conservatorship and that she should view the nomination as a way of creating a safety net, just in case the powers of attorney are not sufficient, and a way of naming the person she would want to be in charge.

Because of the personal nature of the tasks of a conservator of the person, the attorney should emphasize that Jane can nominate different persons as conservator of the estate and conservator of the person.

The nomination of a conservator of the person or of the estate, or both, may be included in a writing (Prob C §1810), which can be a power of attorney for financial matters, a written advance health care directive (Prob C §4672(a)), or a separate document. Many attorneys place the nomination in the power of attorney for asset management. Jane's attorney places her nominations in the revocable trust.

For other considerations that the attorney might discuss with Jane, see §9.30.

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§10.22 e. Executor of Will

Although Jane has decided to hold her largest assets in a trust in order to avoid probate and have them managed for her children, she also will need a "pourover" will. Her will will provide that assets inadvertently not transferred to her trust or intentionally left outside her trust (such as a small bank account) are transferred (poured over) to her trust following her death. Transferring Jane's assets to her trust following her death will ensure that all of her assets are managed and ultimately distributed according to one overall plan in accord with her wishes.

Even though Jane's estate plan should include a will, the attorney should explain to her that it is unlikely that her will will be probated. The will will only effect the transfer of assets outside of Jane's trust that are not held in joint tenancy or that do not have payable-on-death beneficiary designations. The attorney should explain that as long as the total value of those assets is less than $100,000, Jane's trustee, as the beneficiary under Jane's will, will be able to transfer those assets to Jane's trust using an affidavit procedure. Using this procedure, Jane's trustee could collect Jane's bank accounts following her death if Jane's joint tenant, her father, dies before her.

For purposes of efficiency, Jane may choose to nominate the same individual to serve as executor and as trustee of her trust. This will allow that individual to marshal, manage, and distribute all of Jane's assets, those in the trust as well as those outside the trust.

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§10.23 f. Jane's Decisions

After thinking about the issues raised and the alternatives discussed in the estate planning conference, Jane decides that, although there is no perfect solution, she wants her father to serve as her successor trustee, agent under her power of attorney for financial affairs, executor of her will, and conservator of her estate, if a conservator is needed. If her father cannot serve in any of those positions, Jane wants her mother to serve in his place. If her mother is unable to serve, she wants Jocelyn to serve. Finally, if Jocelyn cannot serve, she wants Nancy to serve. She decides to nominate her mother as conservator of the person, with her father and her sister as alternates in that order of priority.

Jane knows that there are potential difficulties in naming her parents as her primary fiduciaries. Although she is concerned that her parents are aging, she believes that if her father or mother could no longer carry out the duties and responsibilities of a fiduciary, each would voluntarily resign. The attorney should advise Jane that she should amend her trust, power of attorney, and will if her parents' health begins to deteriorate.

Jane does not foresee any problems with having her family act as successor trustees, and her attorney can reassure her that if either parent does not or cannot voluntarily resign, Jocelyn, as the successor fiduciary, would be able to go to court to seek their removal. In addition, Nancy and Mike will be in charge of the care of her children's persons, so they could act as a check-and-balance system if a problem did arise. If James has full custody of the children and has evidence that the children's trusts are not being properly managed or applied for their benefit, he will be able to bring his concerns to the attention of the probate court, *e.g.,* by seeking to compel an accounting or redress for breach of trust. If Nancy and Mike are acting as guardians of the person, they would also be able to raise their concerns in a court proceeding.

Because Jane totally trusts those she will name as successor trustees and is confident that there will be sufficient checks and balances to preclude possible misuse of the children's trust funds, she does not want to require that any successor trustee she names in her trust be required to post a bond.

PRACTICE TIP: Although only trust beneficiaries have the right to file an action under Prob C §17200(a) (*e.g.,* to compel an accounting or redress a fiduciary's breach of trust), the probate court has authority to appoint the parent or guardian of a minor beneficiary as guardian ad litem under Prob C §1003, thereby enabling the parent or guardian to step into the shoes of the minor beneficiary and file trust actions to protect the minor trust beneficiary's rights.

Because many of the personal care powers involve expenditures and Jane has decided to establish a revocable trust, she wants the attorney to include the specific personal care instructions in the trust. She asks that her agent under her power of attorney for financial affairs also be given personal care powers. This is especially important because Jane also wants to customize the instructions regarding her children.

Jane trusts the individuals she has named as her fiduciaries to exercise sound judgment in determining whether she has lost the capacity to manage her affairs. However, Jane is also concerned that it may be difficult for a family member or friend to acknowledge that a loved one is no longer able to manage. Accordingly, Jane decides that either her primary care physician or any of the individuals she has named as a fiduciary may decide that she no longer has capacity to manage her affairs.

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§10.24 F. Formulating the Estate Plan for Health Care Decisions

An advance health care directive (AHCD) will enable Jane to designate an agent to make health care decisions for her if she no longer can make these decisions for herself and to state her preferences regarding health care decisions. If Jane becomes incapacitated without an AHCD in place, a conservator of the person may have to be appointed by the court. If Jane has not clearly stated her preferences regarding health care decisions, her family and health care providers may struggle with the burden of making end-of-life decisions without any clear guidance from Jane herself. For some of the considerations that the attorney might discuss with Jane, see §§9.35-9.36.

For sample form, see §10.36. Jane's attorney prefers to use her own attorney-drafted AHCD. Other attorneys generally use the California Medical Association AHCD form. See §§9.33, 11.31.

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1. Statement of Wishes

§10.25 a. Life-Sustaining Treatment

Depending on Jane's personal and religious beliefs, she may wish for all medical and life-sustaining treatment to be administered under all circumstances, or she may wish that such treatments be withdrawn under certain circumstances to permit the natural process of dying. The attorney should explain to Jane that life-sustaining treatment includes artificially providing food and water, including through the use of tubes.

Jane, who does not want to be "kept alive by machines," is aware that the medical care of loved ones can create family conflicts and sees the importance of including instructions in her AHCD. On further discussion, the attorney determines that Jane does not want life-sustaining treatment, including food and water, if she is in a persistent vegetative state with no reasonable hope of recovery.

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§10.26 b. Organ Donation and Cremation

Jane may also include instructions regarding disposition of her remains. She has told her attorney that she wants to be an organ donor, and has already had a statement printed on her driver's license and included on a donor database registry. See §§7.55A, 7.63. She has discussed issues of organ donation and cremation with her family. She also wants her advance health care directive to state that she wants to be an organ donor, but not a tissue donor, and to direct that her remains be cremated.

Jane does not know whether she must take other steps to ensure that her wishes are carried out. The attorney should give Jane the website for Donate Life California (http://www.donatelifecalifornia.org), one of California's four federally designated nonprofit organ procurement organizations (facilitating the donation process across California). If she signs up with the Donate Life California Registry, her desire to donate will be stored in a secure, confidential database. At her death, an official record of Jane's donor registration will be readily available, and even if her family finds that they do not want to follow Jane's wishes when confronted with the reality of the organ donation, they will not be able to overturn her wishes.

By registering to be an organ donor on the Donate Life California website, Jane will have the option of sending a notification form to inform family members of her decision to be a donor.

For complete discussion of California's Uniform Anatomical Gift Act (Health & S C §§7150-7150.40), see §§7.55A, 7.63.

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§10.27 c. Alzheimer's Disease

Jane watched her friend Nancy deal with her mother's Alzheimer's disease as it progressed to the point where her mother had to be placed in a residential facility for Alzheimer's patients. This has led Jane to raise the issue with her attorney and request that a provision be included in her AHCD to stop all treatment, except treatment that would keep her comfortable and free from pain, if she develops Alzheimer's disease and it has progressed to the point where Jane can no longer interact meaningfully with other people.

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§10.28 2. Agent Under Power of Attorney for Health Care Decisions

Usual choices for agents are family members and close friends. Jane should be encouraged to discuss her wishes regarding her health care decisions with her potential agents to determine whether they are emotionally and intellectually equipped to carry out her wishes.

Although Jane appreciates that her parents are getting older, she prefers naming them as her agents because they understand her wishes and live nearby. After the attorney explains that naming them as co-agents could interfere with the ability of one agent to make decisions if the other were not available, Jane decides to designate her mother as her primary agent, with her father and then her sister as the alternates.

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§10.29 3. When Power of Attorney Becomes Effective

As with a power of attorney for financial management, the attorney should discuss with Jane whether she wants her agent's authority under the AHCD to be a "springing power," that is, to become effective only when and if she becomes incapacitated. Based on her age, good health, and current circumstances, Jane is not likely to give immediate power over her health care decisions to anyone else. She decides that she does not want any person named as her agent under the health care power of attorney to be responsible for determining when she cannot make her own health care decisions. In spite of her reservations, she directs her attorney to leave the determination to her primary doctor.

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§10.30 II. FORMS

In addition to Jane's trust, will, durable power of attorney for asset management, and advance health care directive, the attorney will prepare the following documents:

- A deed transferring the property from Jane to her trust (see chap 12).
- A Preliminary Change of Ownership Report (PCOR) (see §12.57). The attorney will fill in the information on the top part of page 1 of the form and check the "Yes" box and the "for the benefit of transferor" box in PART I, Item H.1.; the "No" box for the other items in PART I; and fill in the Certification on page 2, except for Jane's signature.
- A certification of trust that Jane will sign after she has signed her trust (for sample form, see §9.40).
- A transmittal letter that will summarize the estate plan and the contents of the drafts that Jane has directed the attorney to prepare, which will be sent with the letter, and describe the steps still to be taken to execute the documents and fully implement the plan (for other sample transmittal letters, see §§9.44, 11.32).

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Source: Estate Planning/Complete Plans for Small and Mid-Size Estates/10 Plan for Unmarried Person With Minor Children/§10.31 A. Form: Nomination of Guardians

§10.31 A. Form: Nomination of Guardians

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10.31-1 Nomination of guardians

NOMINATION OF GUARDIANS

I, Jane Johnson, am the natural mother of Amy Johnson and Andrew Johnson. I share joint physical and legal custody of Amy and Andrew with their father, James Johnson.

In the event the appointment of a guardian of the person for Amy or Andrew becomes necessary, I nominate Nancy Sims and Michael Sims to serve jointly as such guardians, provided that Nancy and Michael are married and residing together in the Los Angeles area at the time the appointment of a guardian of the person becomes necessary. If, at the time the appointment of such a guardian becomes necessary, Nancy and Michael are no longer married to each other or are no longer residing in the Los Angeles area, or if, following their appointment, Nancy and Michael subsequently file for separation or move out of the Los Angeles area, or if Nancy and Michael do not serve as guardians for any other reason, I nominate my sister, Jocelyn Carson, to serve as guardian of the person, with authority to nominate an alternate or successor guardian.

In the event the appointment of a guardian of the estate for Amy or Andrew becomes necessary, I nominate my father, Michael Jones, to serve as such guardian, and if, for any reason, he is unable to act or ceases to act, I nominate my mother, Karen Jones, to serve, and if she, too, for any reason is unable to act or ceases to act, I nominate my sister, Jocelyn Carson.

Date: _ _ _ _ _ _ __[*Signature*]__
Jane Johnson

[*Acknowledgment; for form see §9.38*]

Comment: This guardian nomination is intended to be a separate, stand-alone document. The original should be kept with all of Jane's other original estate planning documents.

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Source: Estate Planning/Complete Plans for Small and Mid-Size Estates/10 Plan for Unmarried Person With Minor Children/§10.32 B. Form: Jane Johnson Trust

§10.32 B. Form: Jane Johnson Trust

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WARNING: This form is a sample provided by the authors based on the hypothetical in this chapter only. The drafter should refer to the text of Drafting California Revocable Trusts (4th ed Cal CEB 2003). See also the forms in chaps 9 and 11 for alternative trust provisions.

NOTE: Jane's attorney includes personal care provisions in the trust and also in the power of attorney for asset management (see §10.35). The attorney also includes in the trust Jane's nominations of a conservator of the person and of the estate. For discussion of nomination of conservator, see California Powers of Attorney and Health Care Directives §§5.44-5.45 (Cal CEB 2008).

10.32-1 Declaration of Trust: Jane Johnson Revocable Trust

DECLARATION OF TRUST
JANE JOHNSON REVOCABLE TRUST

I, JANE JOHNSON, declare that I have transferred to myself as Trustee the property listed on the attached Schedule A, to be administered and distributed according to the provisions of this Declaration of Trust.

ARTICLE 1: CREATION OF TRUST

1.1 Identification of Settlor

By executing this Declaration of Trust, I am creating a revocable trust to hold my property for my benefit. All references in this Declaration to "Settlor" refer only to me as the creator of this Trust.

1.2 Identification of Trustee

I have appointed myself as Trustee of this Trust to manage my property according to the provisions of this Declaration. References in this Declaration to "Trustee" refer to me as manager of this Trust and also to all persons who may later serve as Successor Trustees, including Successor Co-Trustees.

1.3 The Trust Estate

I have transferred, or will transfer, property I currently own to this Trust. I may transfer to the Trust additional property that I acquire in the future. Others may add property to this Trust with my consent, or if I am not then serving as Trustee, with the consent of the Successor Trustee. References in this Declaration to "Trust estate" include all property now or hereafter added to this Trust. All property added to this Trust shall be subject to the provisions of this Declaration.

1.4 The Settlor's Family

I am unmarried. I have two children, my daughter, AMY JOHNSON, born August 15, 2001, and my son, ANDREW JOHNSON, born March 22, 1999. I have no other children, living or deceased. My parents, MICHAEL JONES and KAREN JONES, are both living. My sister, JOCELYN CARSON, is living. I have no other siblings, living or deceased.

1.5 Name of Trust

The name of this Trust is the "Jane Johnson Revocable Trust," dated _ _[*date*]_ _.

ARTICLE 2: DISTRIBUTIONS DURING MY LIFETIME

2.1 Payments From Trust Estate for Myself and My Children

During my lifetime, the Trustee shall pay to or apply for my benefit as much of the income and principal of the Trust estate as I may request, plus such additional sums as the Trustee, in the Trustee's discretion, determines are appropriate for my proper health care, education, support, maintenance, and comfort, in accordance with my accustomed standard and manner of living. In addition, the Trustee shall pay to, or apply for the benefit of, my children who have not reached age twenty-two (22), as much income and principal of the trust estate as the Trustee determines, in the Trustee's discretion, is necessary for such children's health, education, support, and maintenance, after taking into account all other resources reasonably available to my children for these purposes.

2.2 Payments to Others

As long as I have capacity to manage my finances, I may direct the Trustee to distribute property from the Trust estate to any person, organization, or entity. If I lack capacity to manage my financial affairs, any Agent I expressly authorize to make gifts on my behalf in a durable power of attorney may direct the Trustee to distribute property from the Trust estate to any person, organization, or entity.

ARTICLE 3: DISTRIBUTION OF THE TRUST ESTATE AFTER MY DEATH

After my death, and after the lapse of the survivorship period required by section 3.1 and the payment of debts and taxes as required by section 3.2 and section 3.3, the Trustee shall distribute the balance of the Trust according to the provisions of this Article 3.

3.1 Requirement to Survive Settlor for Distribution

If any beneficiary does not survive me for thirty (30) days, for all purposes of this Declaration of Trust, such beneficiary shall be considered to have died before me. Further, all references to a beneficiary's survivorship shall be deemed to require survival for such thirty-day period.

3.2 Payment of Expenses and Debts

The Trustee shall pay my debts, except for unmatured mortgages and obligations secured by trust deeds on real estate; the expenses of my last illness and funeral; all estate and inheritance taxes, if any, and fees and costs incurred in administering this Trust, unless the Trustee determines that other adequate provisions have been made for payment of these expenses.

3.3 Payment of Taxes Resulting From My Death

Except as otherwise provided in this Declaration, the Trustee may pay all inheritance, estate, generation-skipping transfer taxes, or other taxes, including interest and penalties, resulting from my death attributable to assets passing under or outside of this Trust from the assets of the Trust. All such taxes attributable to a gift designated as "free of any inheritance, estate, generation-skipping transfer, or other similar taxes" shall be paid out of the balance of the Trust estate without apportionment, deduction, or reimbursement.

All inheritance, estate, generation-skipping transfer taxes, or other taxes, including interest and penalties, resulting from my death attributable to assets passing under or outside of this Trust shall be apportioned among the beneficiaries in the manner provided by California and federal law in effect at the time of my death. For purposes of this section 3.3, "taxes" includes all estate and inheritance taxes, generation-skipping transfer taxes, Internal Revenue Code section 2032A recapture taxes, taxes attributable to excess retirement accumulations, and interest and penalties on such taxes. I direct my Trustee to seek reimbursement for such taxes paid by the Trustee from the recipients of property subject to any such tax to the fullest extent permitted by law.

3.4 Distribution of Tangible Personal Property

The Trustee shall distribute all of my tangible personal property, including automobiles, household furniture, furnishings, objects of art, clothing, personal effects, and other tangible articles of a personal nature, together

with any interest in any insurance on such property, to my children who survive me, to be divided as they shall agree, or if they cannot agree, in approximately equal shares as determined by the Trustee.

If at the time of my death any child of mine is then a minor, the Trustee shall select items from among my tangible personal property for each minor child, taking into account, to the extent the Trustee deems advisable, any preferences expressed by each child. The Trustee shall distribute the items selected on behalf of each minor child to the child at such times as the Trustee deems appropriate. The Trustee may, in the Trustee's discretion, distribute such items to the person with whom the minor child lives as Custodian for the child under the California Uniform Transfers to Minors Act.

3.5 Distribution of the Balance of the Trust Estate

The Trustee shall divide the balance of the Trust estate into equal shares, creating one share for my daughter, AMY, one share for my son, ANDREW, and one share for each of my other children hereafter born to me or adopted by me. The Trustee shall distribute each child's share to the child, subject to the terms and conditions of this section. If AMY, ANDREW, or any of my other children does not survive me, the Trustee shall instead distribute the deceased child's share to such child's issue, also subject to the terms and conditions of this section. If the deceased child has no issue, the Trustee shall instead add the share of the deceased child in equal shares to the shares of my other children.

A. Each share for the issue of a deceased child shall be distributed outright and free of trust to that beneficiary, provided however, that if that beneficiary is under the age of 21, distribution shall be to a Custodian (to be named by the Trustee) for that beneficiary under the California Uniform Transfers to Minors Act until the beneficiary reaches the age of 21.

B. As long as any child of mine who is entitled to distribution of a portion of the Trust estate is under age thirty-five (35), the Trustee shall retain that beneficiary's share in a separate Trust and administer the share according to the terms of this section.

(1) The Trustee shall pay to, or apply for the benefit of, the beneficiary as much of the net income and principal of the beneficiary's Trust as the Trustee, in the Trustee's discretion, deems necessary for the beneficiary's proper health, education, support, and maintenance, after taking into consideration, to the extent the Trustee deems advisable, the beneficiary's other income or resources known to the Trustee and reasonably available for these purposes.

(2) When the beneficiary reaches age twenty-one (21), the Trustee shall distribute to the beneficiary, outright and free of trust, twenty-five (25) percent of the beneficiary's Trust then remaining. When the beneficiary reaches age thirty (30), the Trustee shall distribute to the beneficiary, outright and free of trust, fifty (50) percent of the beneficiary's Trust then remaining. When the beneficiary reaches age thirty-five (35) the Trustee shall distribute to the beneficiary, outright and free of trust, all of the balance of the beneficiary's Trust then remaining, and the Trust shall then terminate.

(3) If a beneficiary dies before receiving distribution of all of the beneficiary's Trust estate, the undistributed balance shall be distributed to such deceased beneficiary's issue, subject to the terms and conditions of subsection 3.5.A. If such deceased beneficiary has no issue, the undistributed balance shall instead be distributed to my issue, subject to the terms and conditions of this section 3.5.

3.6 Distribution if All of My Beneficiaries Are Deceased

If at the time of the my death, or at any later time before full distribution of the Trust estate, all of my issue are deceased and no other disposition of the property is directed by this Declaration, then the Trustee shall distribute the remaining Trust estate to my sister, JOCELYN CARSON. If JOCELYN is not then living, the Trustee shall instead distribute the balance of the Trust estate to JOCELYN'S issue in equal shares by right of representation. If JOCELYN has no issue, the Trustee shall instead distribute the balance of the Trust estate in equal shares to my parents, or if one of them is then deceased, all to the one of them who is then living. If neither of my parents is then living, the Trustee shall instead distribute the balance of the Trust estate to AUDREY SIMS.

If AUDREY is not then living, the Trustee shall instead distribute the balance of the Trust estate to my heirs, their identities and respective shares to be determined as if my death had then occurred, according to the laws

of the State of California then in effect governing succession of separate property not previously acquired from a predeceased spouse.

If any beneficiary entitled to a distribution of a portion of the Trust estate pursuant to this section 3.6 is under the age of twenty-one (21), the Trustee shall distribute such beneficiary's share of the Trust estate to a Custodian to be named by the Trustee under the California Uniform Transfers to Minors Act until that beneficiary reaches the age of 21.

ARTICLE 4: TRUSTEE PROVISIONS

4.1 Trustee During My Lifetime

During my lifetime and for as long as I have capacity to manage my financial affairs, I shall act as Trustee of this Trust. I shall be conclusively deemed to have lost capacity to serve as Trustee when my primary care physician or any person named as my Successor Trustee in section 4.2 certifies in writing that I do not have capacity to serve as Trustee.

4.2 Successor Trustee

If I do not serve as Trustee for any reason, my father, MICHAEL JONES, shall serve as Trustee, with authority to appoint a co-trustee, alternate, or successor. If MICHAEL does not serve as Trustee for any reason, and does not appoint a co-trustee, alternate, or successor, my mother, KAREN JONES, shall serve as Trustee, with authority to appoint a co-trustee, alternate, or successor. If KAREN does not serve as Trustee for any reason, and does not appoint a co-trustee, alternate, or successor, then my sister, JOCELYN CARSON, shall serve as Trustee, with authority to appoint a co-trustee, alternate, or successor. If JOCELYN does not serve as Trustee for any reason, and does not appoint a co-trustee, alternate, or successor, then NANCY SIMS shall serve as Trustee, with authority to appoint a co-trustee, alternate, or successor. No person I have named as Trustee, nor any person appointed by any person I have named as Trustee, shall be required to seek court confirmation of his or her appointment as Trustee.

4.3 Bond of Trustee

No person I have named as Trustee, nor any person appointed by any person I have named as Trustee, shall be required to post a bond.

4.4 Disability of Trustee

For the purposes of this Declaration, an individual Trustee (other than me) shall not be qualified to act if suffering from any disability, illness, or injury that renders the Trustee unable to conduct the regular affairs of the Trust—including endorsement for receipt of funds and writing of checks for disbursement of funds—if such disability is likely to extend for a period of more than thirty (30) days. In determining the disability of an individual Trustee, a remaining Co-Trustee or a Successor Trustee may rely on a certificate or other written statement from a licensed physician who has examined the individual, certifying that such Trustee has a disability likely to adversely affect her or his ability to manage the Trust estate properly. A court determination of such disability shall not be necessary.

4.5 Liability of Successor Trustee

No Successor Trustee shall be liable for any act, omission, or default of a predecessor Trustee. No Successor Trustee shall necessarily 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.

4.6 Resignation of Trustee

A Trustee may at any time resign by giving thirty (30) days' written notice to me, if I am then living, or to the person or persons then entitled to receive income payments from this Trust and to any remaining Co-Trustee or, if there is none, to the Successor Trustee. If there is no such remaining Co-Trustee or Successor Trustee named above or nominated pursuant to the power given above who is willing to serve, the Trustee shall select a Successor Trustee, and may resign upon receiving written acceptance of trusteeship from the successor.

4.7 Trustee Compensation

I shall receive no compensation for serving as Trustee. Any other person who serves as Trustee shall be entitled to reasonable compensation for services rendered—including services related to termination of this Trust—and to reimbursement for costs and expenses advanced on behalf of the Trust.

ARTICLE 5: TRUSTEE'S POWERS

To carry out the purposes of this Trust, and subject to any limitation stated elsewhere in this Declaration, I, as Trustee, and all successor Trustees are vested with the powers described in this Article 5 in addition to those powers now or hereafter conferred by law.

5.1 Power to Employ Agents and Advisers

The Trustee may employ investment advisers, experts, attorneys, and accountants, for Trust purposes, at the expense of the Trust.

5.2 Power to Receive Income and Assets

The Trustee may apply for and receive all income, reimbursements, and assets to which I or the Trust estate is entitled, including but not limited to interest, dividends, rent, salaries, wages, distributions from partnerships, insurance reimbursements, gifts, bequests, devises, and tax refunds.

5.3 Payment of Trust Expenses and Trustee Compensation

The Trustee may disburse Trust funds to pay all costs and expenses of the Trust estate, including reasonable compensation to the Trustee for services rendered to the Trust. The Trustee may also reimburse the Trustee for out-of-pocket expenses incurred on behalf of the Trust.

5.4 General Property Powers

The Trustee may perform all acts and exercise all rights and privileges in managing the Trust as if the absolute owner of the Trust estate. These powers include the right to manage, control, sell, convey, exchange, partition, assign, divide, improve, and repair Trust property; to grant options and to sell Trust property upon deferred payments; to lease Trust property for terms within or extending beyond the duration of the Trust for any purpose, including the exploration and removal of oil, gas, and other minerals; and to create restrictions, easements, and other servitudes.

5.5 Retention of Assets

The Trustee may retain in trust, without liability for loss or depreciation, the original Trust assets and all other property hereafter transferred to the Trust.

5.6 Power to Insure

The Trustee may carry insurance of such kinds and in such amounts as the Trustee deems advisable to protect the Trust estate and the Trustee personally against any hazard. The costs of such insurance shall be paid from the Trust.

5.7 Bank Accounts

The Trustee may open and maintain bank accounts in the name of the Trustee with any bank, trust company, or savings and loan association and may designate one or more agents to conduct banking by giving written notice of such designation to the bank, trust company, or savings and loan association. Such bank, trust company, or savings and loan association shall be protected in relying upon such designation.

5.8 General Investment Powers

The Trustee may invest principal and income in every kind of property, real, personal, or mixed, and every

kind of investment, including but not limited to shares in mutual funds, corporate obligations of every kind, and preferred and common stock, that persons of prudence, discretion, and intelligence acquire for their own accounts.

5.9 Powers Regarding Securities

The Trustee may exercise all of the rights, powers, and privileges of an owner of securities, including the right to vote and give proxies; to participate in voting trusts, pooling agreements, foreclosures, reorganizations, consolidations, mergers, and liquidations; to deposit securities with and transfer title to any protective committee on such terms as the Trustee may deem advisable; to exercise or sell stock subscriptions or conversion rights; 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 unregistered.

As Trustee, I may buy, sell, and trade securities on margin, and for such purposes may maintain and operate margin accounts with brokers, and may pledge any securities held or purchased with such brokers as security for loans and advances made to the Trustee for Trust purposes. No Successor Trustee may buy, sell, or trade securities on margin.

5.10 Power to Purchase Bonds

The Trustee may purchase bonds and pay any premiums connected with the purchase that the Trustee deems advisable, provided, however, that each premium is repaid periodically to principal from the interest on the bond in a reasonable manner as determined by the Trustee or from the proceeds on the sale or other disposition of the bond.

The Trustee may purchase bonds at a discount as the Trustee deems advisable. If the Trustee determines that the current yield on the bonds is materially less than the rate of return that the Trust estate could otherwise obtain with equivalent safety, all or a portion of the discount shall be credited periodically to income of the Trust in a reasonable manner determined by the Trustee and, to the extent necessary, paid from the proceeds on the sale or other disposition of the bond or from Trust principal.

5.11 Authority to Purchase Life Insurance and Annuities

The Trustee may purchase and maintain annuities and life insurance policies on the life of any beneficiary or for the benefit of any beneficiary as a Trust investment. The Trustee may exercise settlement options and compromise claims made on any such policy. The Trustee may accept payments due the Trust under any settlement arrangement made before or after the death of the insured and may exercise any rights available to the Trustee under such agreement. The receipt of proceeds by the Trustee shall fully discharge the insurer, who shall not be required to see application of the proceeds.

5.12 Right to Cancel Insurance Policies

The Trustee may, in the Trustee's sole discretion, cancel any insurance policy at any time. In the event the Trustee intends not to pay any premium or otherwise intends to cancel, convert, or substantially modify any policy, the Trustee shall first give the insured, or the guardian or conservator of the insured, at least fifteen (15) days' written notice.

5.13 Authority to Borrow and Encumber

The Trustee may borrow money for any Trust purpose upon such terms and conditions as the Trustee deems proper. To secure such loans, the Trustee may encumber any Trust property by mortgage, deed of trust, pledge, or otherwise. In addition to encumbering property for a loan being made to the Trust, the Trustee may also obligate, hypothecate, and encumber Trust property to guarantee repayment of loans to me personally.

5.14 Loans to Trust by Trustee

The Trustee may advance money from the Trustee's own funds to the Trust for any Trust purpose. Such loans shall earn interest at the prevailing market rate and shall be repaid out of principal.

5.15 Power to Operate Business

The Trustee may retain and operate any business that becomes a part of the Trust estate for as long as the Trustee deems advisable, solely at the risk of the Trust. The Trustee may incorporate any such business and hold the stock as an asset of the Trust estate; and may employ such officers, managers, employees, and agents as the Trustee deems advisable to manage the business. The Trustee may dissolve, liquidate, or sell any business at such time and upon such terms as the Trustee deems advisable.

5.16 Power to File Tax Returns

The Trustee may file tax returns of every type on my behalf and on behalf of the Trust estate.

5.17 Adjustment for Tax Consequences

The Trustee may take any action and make any election that the Trustee deems necessary to minimize the tax liabilities of the Trust or Trust beneficiaries.

5.18 Power to Commence or Defend Litigation; Compromise Claims

The Trustee may commence or defend such litigation with respect to the Trust or any property of the Trust estate as the Trustee deems advisable, at the expense of the Trust. The Trustee may compromise and settle any claims or litigation against or in favor of the Trust.

5.19 Power to Reimburse Trustee

The Trustee may reimburse the Trustee from principal or income for any loss or expense incurred by reason of the Trustee's ownership or holding of any property in this Trust.

5.20 Delegation by Trustee

Any individual Co-Trustee may, with the consent of the other Co-Trustees, delegate any or all of such individual Co-Trustee's power, duty, and discretion to the other Co-Trustees by a written instrument. The individual Co-Trustee may revoke such delegation at any time.

5.21 Personal Care Powers During Incapacity

If I lose capacity to manage my financial affairs, the Trustee shall have authority to provide for my personal care and to maintain my customary standard of living; to provide suitable living quarters for me; and to hire and compensate household, nursing, and other employees as my Trustee considers advisable for my well-being. This shall specifically include but not be limited to the authority to procure and pay for clothing, transportation, medicine, medical care, food, recreational and entertainment activities, and other needs and to make arrangements, enter into contracts, and commit my resources on my behalf with respect to provision of residential care for me in a convalescent hospital, skilled nursing facility, or other alternative residential facility.

5.22 Release of Powers

The Trustee may release or restrict the scope of any power that the Trustee may hold in connection with the Trust, whether such power is expressly granted in this Declaration or implied by law. The Trustee shall exercise this authority in a written instrument executed by the Trustee, specifying the powers to be released or restricted and the nature of the restriction.

5.23 Power to Make Nonprorata Distributions

When the Trustee must divide any Trust property into parts or shares for the purpose of distribution or otherwise, the Trustee may, in the Trustee's discretion, make the division and distribution in undivided interests, in kind, or partly in kind and partly in money, prorata or nonprorata. The Trustee may make sales of the Trust property that the Trustee considers appropriate to accommodate such distributions.

5.24 Power to Delay Distributions

When an event occurs on which the Trustee is required to divide or distribute Trust property, the Trustee

may delay the division or distribution of all or part of the property for the period of time necessary to ascertain and provide for the payment of any tax claim or other liability, contingent or otherwise, against the Trust property. During this period, the Trustee may pay the net income of the Trust to the beneficiaries entitled to it, and any income not distributed shall on resolution of any tax claim or other liability be payable to the person entitled to it immediately after the Trustee receives the income. This provision shall not be deemed to postpone or defer the vesting of any interest created by the dispositive clauses of the Trust.

ARTICLE 6: ADMINISTRATIVE PROVISIONS

The administration of the Trust shall be subject to the general provisions set forth in this Article.

6.1 Physical Division of Property

If this Declaration instructs the Trustee to create separate Trusts for my beneficiaries, the Trust property need not be physically divided between the respective Trusts. However, at all times the Trustee shall keep records and books of accounts with respect to each Trust whereby all of its assets, income, and liabilities will be clearly distinguishable from each other Trust.

6.2 Spendthrift Clause

The interests of the beneficiaries in the principal and income of this Trust shall not be subject to any claim or claims of my creditors or others, or to legal process, and may not be voluntarily or involuntarily alienated or encumbered.

6.3 Principal and Income Act Governs

The Trustee shall determine all matters with respect to what is principal and income of the Trust estate and apportionment and allocation of receipts and expenses between these accounts by the provisions of the California Revised Uniform Principal and Income Act. When such Act does not provide, the Trustee shall determine the characterization in the Trustee's reasonable discretion. The Trustee shall establish reasonable reserves for depreciation, notwithstanding any other provisions of this Trust or the California Revised Uniform Principal and Income Act.

6.4 Application to Probate Court

If any disputes arise as to interpretation of this Declaration, or if a need arises to obtain court approval of any accounting, the Trustee shall make application to the Probate Court. I intend that the court shall not assume continuing jurisdiction of the Trust except as may be required by law.

6.5 Right of Trustee to Probate Trust Assets

Notwithstanding any other provisions of this Declaration, the Trustee may, in the Trustee's discretion, direct the Executor of my Will to subject any or all Trust assets to the jurisdiction of the Probate Court.

6.6 Authorization for Single Signature

Whenever two or more individuals are serving as Trustee, each individual Trustee is authorized to sign alone on any Trust account maintained by the Trustee at any bank or other financial institution. The bank or other financial institution shall have no duty to investigate or inquire with respect to any actions taken with regard to such an account by any Trustee acting alone.

6.7 Number and Gender

As used in this Declaration, the masculine, feminine, and neuter gender, and the plural and singular number, shall each be deemed to include the others when the context so indicates.

6.8 Partial Invalidity

If any provision of this Declaration is void, invalid, or unenforceable, the remaining provisions shall

nevertheless be valid and effective.

6.9 Headings

The headings, titles, and subtitles are inserted solely for convenient reference and shall be ignored in any construction of this Declaration.

6.10 Perpetuities Savings Clause

Unless terminated earlier in accordance with other provisions of this Declaration, this Trust shall terminate twenty-one (21) years after the death of the last of my issue to die who was living on the date of my death. The principal and undistributed income of a terminated Trust shall be distributed to the income beneficiaries of the Trust in the same proportion that the beneficiaries are entitled to receive income when the Trust terminates. If at the time of termination the rights to income are not fixed by the terms of the Trust, distribution under this clause shall be made to the persons who are then entitled or authorized, in the Trustee's discretion, to receive trust payments.

6.11 Contests and Disinheritance of Omitted Heirs

Except as otherwise provided in this Declaration, I have intentionally and with full knowledge failed to provide for my heirs. In the event that any person, singly or in conjunction with any other person, contests the validity of this Trust, my last Will, or the disposition of the assets of the Trust estate, or otherwise seeks to void, nullify, or set aside this Trust, then that person's right to take any interest given to him or her by this Trust shall be determined as if the person had predeceased me without surviving issue.

6.12 Survivorship Requirements

All references in this Trust to a beneficiary surviving me shall be interpreted to require that the beneficiary survive for thirty (30) days. If the beneficiary does not survive for thirty (30) days, for all purposes of this Trust the person shall be considered to have died before me.

6.13 Definitions of "Children," "Issue," and "Education"

As used in this Declaration, the term "issue" refers to lineal relatives of all degrees related by blood or adoption. This term and the term "children" as used in this Declaration do not include stepchildren, foster children, and adopted children who were adults at the time of their adoption.

Distribution to a deceased beneficiary's issue shall be made in the manner prescribed in California Probate Code §246 in effect at the date of execution of this Declaration of Trust, which provides:

"Where a will, trust, or other instrument calls for property to be distributed or taken in the manner provided in Section 246 of the Probate Code, the property to be distributed shall be divided into as many equal shares as there are living children of the designated ancestor, if any, and deceased children who leave issue then living. Each living child of the designated ancestor is allocated one share, and the share of each deceased child who leaves issue then living is divided in the same manner."

As used in this Declaration, the term "education" refers to secondary education, including private schooling, costs of extracurricular activities, training in music, theater, and the arts, and any course of study at any postsecondary institution chosen by the beneficiary, including vocational, trade, and technical schools, junior and four-year colleges, professional schools, and postgraduate schools, so long as the beneficiary is making satisfactory academic progress toward a degree or certificate, as determined by the Trustee. Payments for education shall include costs of tuition, fees, books, and reasonable living and transportation expenses. The Trustee may purchase a vehicle for the beneficiary if the Trustee determines that such purchase is in the best interest of the beneficiary.

6.14 Choice of Law

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 on the date of execution of this Declaration. This paragraph shall apply regardless of any change of residence of the Trustee or any beneficiary, or the appointment or substitution of a

Trustee residing or doing business in another state.

ARTICLE 7: REVOCATION AND AMENDMENT

7.1 Revocation During My Lifetime

At any time, I may revoke this Trust by withdrawing the assets from the Trust or by signing a written declaration stating that the Trust is revoked. I must notify the Trustee immediately in writing of such revocation if I am not then serving as Trustee.

7.2 Amendment During My Lifetime

At any time, I may amend any term of this Declaration by signing a written amendment. An amendment shall become effective immediately after I sign it and acknowledge my signature before a Notary Public. I may change or cancel any amendment in the same manner.

If I am not then serving as Trustee, I shall deliver any amendment I make to the Trustee personally or by certified mail. No Trustee shall be obliged to act under an amendment unless the Trustee signs a written acceptance. If a Trustee does not accept an amendment within ten (10) days of receipt, such Trustee shall be deemed to have resigned. I shall pay to such Trustee any compensation earned and shall indemnify such Trustee against liability lawfully incurred by the Trustee in the administration of this Trust.

7.3 Revocation and Amendment After My Death

After my death, no Trust created by this Declaration shall be amended or revoked.

7.4 Revocation and Amendment Powers Personal to Me

My powers to revoke and amend this Declaration are personal to me. If I become disabled, only a conservator who has obtained prior court approval may exercise these powers on my behalf.

ARTICLE 8: NOMINATIONS

I have executed this Trust and other estate planning documents to avoid the necessity of ever appointing a conservator for me. However, if appointment of a conservator for me becomes necessary, I nominate the individuals set forth in this Article 8 to serve as my conservator.

8.1 Conservator of the Person

I nominate KAREN JONES to serve as conservator of my person. If KAREN does not serve for any reason, I nominate MICHAEL JONES as conservator of my person. If MICHAEL does not serve for any reason, I nominate JOCELYN CARSON as conservator of the person. I revoke all prior nominations for conservator of my person.

8.2 Conservator of the Estate

I nominate MICHAEL JONES as conservator of my estate. If MICHAEL does not serve for any reason, I nominate KAREN JONES as conservator of my estate. If KAREN does not serve for any reason, I nominate JOCELYN CARSON as conservator of my estate. I revoke all prior nominations for conservator of my estate.

In witness whereof, the provisions of this Declaration shall bind me as Settlor and Trustee, Successor Trustees assuming the role of Trustee, and the beneficiaries of this Trust, as well as all of my heirs, successors, personal representatives, agents, conservators, and assigns.

Executed at Los Angeles, California, on _ _[*date*]_ _.

__[*Signature*]__
JANE JOHNSON
Settlor and Trustee

[*Acknowledgment; for form see §9.38*]

Schedule A

1. Household furniture and furnishings, personal effects, clothing, and jewelry, owned or hereafter acquired.

2. Real property located at 123 First Street in Los Angeles, California, further described as Lot 1 of Tract 2, as per map recorded in Book 3, Pages 4 through 5, inclusive, of Maps, in the office of the Los Angeles County Recorder.

3. Brokerage Account No. 987-654-3210 at XYZ Investments, Inc.

4. Stamp collection, grandmother's china collection, grandfather's gold pocket watch, great grandfather's antique solid oak desk.

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Source: Estate Planning/Complete Plans for Small and Mid-Size Estates/10 Plan for Unmarried Person With Minor Children/§10.33 C. Form: Assignment to Trust

§10.33 C. Form: Assignment to Trust

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NOTE: For discussion of assignments to a trust and alternative sample forms, see chap 12.

10.33-1 Assignment to Jane Johnson Revocable Trust

ASSIGNMENT TO JANE JOHNSON REVOCABLE TRUST

I, JANE JOHNSON, as Settlor, assign to myself as Trustee of the Jane Johnson Revocable Trust dated _ _[*date*]_ _, all of my interest in my tangible personal property, including my stamp collection, my grandmother's china collection, my grandfather's gold pocket watch, my great grandfather's antique solid oak desk, household furniture, furnishings, objects of art, clothing, personal effects, and other tangible articles of a personal nature, that I now own, or that I later acquire.

This property shall be held, managed, and distributed according to the Trust's terms as they exist as of this date of assignment or as they are amended in the future.

Date: _ _ _ _ _ _ __[*Signature*]__
JANE JOHNSON, Settlor

The Trustee accepts this assignment and agrees as above.

Date: _ _ _ _ _ _ __[*Signature*]__
JANE JOHNSON, Trustee

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Source: Estate Planning/Complete Plans for Small and Mid-Size Estates/10 Plan for Unmarried Person With Minor Children/§10.34 D. Form: Pourover Will

§10.34 D. Form: Pourover Will

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Description of document:

This pourover will transfers the residue of the testator's estate to the trustee of the trust. In the typical revocable trust estate plan, the testator transfers all major assets to the trust during life. The will functions as a safeguard, sweeping into the trust assets inadvertently not transferred to the trust. For another sample of a pourover will, see chap 9.

WARNING: This form is provided by the authors as a sample based on the hypothetical in this chapter only. The drafter should refer to the text of California Will Drafting (3d ed Cal CEB 1992) before preparing a will.

10.34-1 Will of Jane Johnson

WILL OF JANE JOHNSON

I, JANE JOHNSON, a resident of Los Angeles County, California, declare that this is my Will. I revoke all Wills and Codicils that I have previously made.

Article 1: Declaration Concerning Family

I am unmarried. I have two children, my daughter, Amy Jones, and my son, Andrew Jones. I have no other children, living or deceased. My parents, Michael Johnson and Karen Johnson, are both living. My sister, Jocelyn Carson, is living. I have no other siblings, living or deceased.

Article 2: Disposition of Estate

I give all of my property, of every kind and description, real, personal, and mixed, and wherever located to the Trustee of the Jane Johnson Revocable Trust, which I executed earlier today, to be added to that Trust and administered according to its terms, including, without limitation, any amendment made to it before my death.

I do not intend to create a separate Trust by this Will or to subject the Trust or the property added to it by this Will to the jurisdiction of the Probate Court. If, however, at the time of my death, the law prohibits distribution to my Trust pursuant to this Will, or if my Trust is not then in existence, is revoked after the date of this Will, or fails for any reason, I incorporate all of the terms of my Trust in this Will by this reference, and I give my estate, in trust, to the Executor, to be held, administered, and distributed according to the incorporated Trust terms.

Article 3: Nomination of Executor

I nominate my father, Michael Jones, to serve as Executor, with authority to appoint a co-executor, alternate, or successor. If Michael does not serve as Executor for any reason, and does not appoint a co-executor, alternate, or successor, I nominate my mother, Karen Jones, as Executor, with authority to appoint a co-executor, alternate, or successor. If Karen does not serve as Executor for any reason, and does not appoint a co-executor, alternate, or successor, I nominate my sister, Jocelyn Carson, as Executor, with authority to appoint a co-executor, alternate, or successor.

The term "my Executor" as used in this Will shall include any personal representative of my estate. No bond shall be required of any Executor nominated in this Will or pursuant to authority given herein, whether acting jointly or severally in the administration of my estate.

Article 4: Powers of Executor

I authorize my Executor to sell, lease, mortgage, invest, exchange, manage, and otherwise deal with any

property belonging to my estate in any way that the Executor considers advisable, either with or without notice, subject to such confirmation as may be required by law.

When making any division or distribution of property, the Executor may, in the Executor's discretion, make the division and distribution in undivided interests, in kind, or partly in kind and partly in money, prorata or nonprorata. The Trustee may make sales of the Trust property that the Trustee considers necessary to accommodate such distributions.

Unless otherwise specified in this Will, any distribution made by the Executor (or Trustee, for distributions to be made by the Trustee) to a minor beneficiary under this Will (including a distribution from a trust hereunder) may be made to a custodian selected by the Executor (or the Trustee, for distributions to be made by the Trustee) as Custodian for the minor beneficiary until age twenty-one (21) under the California Uniform Transfers to Minors Act (Probate Code §§3900-3925). The Executor (or Trustee, for distributions to be made by the Trustee) may select herself or himself to serve as Custodian.

Article 5: Miscellaneous Provisions

My Executor may administer my estate under the California Independent Administration of Estates Act (Probate Code §§10400-10592).

For purposes of this Will, a person is deemed to survive me only if that person survives me by 30 days.

In Witness Whereof, I have signed this, my Will, on _ _[*date*]_ _.

__[*Signature*]__
JANE JOHNSON

On the date written below, Jane Johnson declared to us, the undersigned, that the foregoing instrument, consisting of three (3) pages, including the page signed by us as witnesses, was her Will and requested us to act as witnesses to it. She thereupon signed this Will in our presence, all of us being present at the same time. We now, in her presence and in the presence of each other, subscribe our names as witnesses and declare that she appears to be of sound mind and under no duress, fraud, or undue influence. We further declare that we know of no facts indicating that this Will, or any part of it, was procured by duress, menace, fraud, or undue influence.

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

Executed on _ _[*date*]_ _, at _____, California.

__[*Signature of witness*]__
_ _[*Typed name*]_ _
_ _[*Address*]_ _

__[*Signature of witness*]__
_ _[*Typed name*]_ _
_ _[*Address*]_ _

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Source: Estate Planning/Complete Plans for Small and Mid-Size Estates/10 Plan for Unmarried Person With Minor Children/§10.35 E. Form: Attorney-Drafted Durable Power of Attorney for Financial Management

§10.35 E. Form: Attorney-Drafted Durable Power of Attorney for Financial Management

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Description of document:

This durable power of attorney includes the same authority given to the trustee in the trust to provide for personal care and family maintenance powers (see §10.32).

WARNING: This form is a sample based on the hypothetical in this chapter. The drafter should refer to the text of California Powers of Attorney and Health Care Directives (Cal CEB 2008) before preparing a durable power of attorney. For financial management and personal care issues and forms, see Powers of Attorney, chaps 4-6; for nomination of conservator, see Powers of Attorney §§5.44-5.45.

10.35-1 Attorney-drafted durable power of attorney

SPRINGING DURABLE POWER OF ATTORNEY FOR FINANCIAL MANAGEMENT

(California Probate Code §§4000-4310)

I, Jane Johnson, a resident of Los Angeles County, California, declare:

1. This is a springing durable power of attorney. It shall become effective upon my incapacity and shall remain in effect until my restoration to capacity. I shall be conclusively deemed to have become incapacitated when my primary care physician *or* any person named as my Agent in this power of attorney certifies in writing that I do not have capacity to manage my financial affairs. I shall be conclusively deemed to have been restored to capacity when my primary care physician *or* any person named as my Agent in this power of attorney certifies in writing that I again have capacity to manage my financial affairs. I waive any privacy privilege that may apply to my physician in executing the written certifications required by this paragraph.

2. I appoint Michael Jones, residing at 1704 Grand Island Avenue, Santa Monica, California, home telephone (310) 555-5555, cell telephone (310) 555-3333, as my Agent to exercise the following powers on my behalf:

A. To deposit in and draw on any accounts that I may have in banks, savings and loan associations, securities brokerages, and other financial institutions; and to establish and terminate all such accounts.

B. To collect and deposit for my benefit all interest, dividends, or other payments that may be due to me; to demand, arbitrate, and pursue litigation on my behalf concerning all rights and benefits to which I may be entitled; and to compromise, settle, and discharge all such matters as my Agent considers appropriate under the circumstances.

C. To collect and deposit for my benefit all retirement and pension benefits and Social Security benefits. I designate my Agent as representative payee for my Social Security benefits.

D. To transfer my assets to any revocable trust of which I am the Settlor.

E. To pay my debts and to adjust and compromise any claims that may be made against me as my Agent considers appropriate under the circumstances.

F. To do all things and enter into all transactions necessary to provide for my personal care and to maintain my customary standard of living; to provide suitable living quarters for me; and to hire and compensate household, nursing, and other employees as my Agent considers advisable for my well-being. This shall specifically include, but not be limited to, the authority to procure and pay for clothing, transportation, medicine, medical care, food, and other needs and to make arrangements, enter into contracts, and commit my

resources on my behalf with respect to provision of residential care for me in a convalescent hospital, skilled nursing facility, or other alternative residential facility.

G. To pay for the health, education, support, and maintenance of each of my children who has not reached the age of 35, after taking into consideration, to the extent my Agent deems advisable, expenses for my own needs, and other resources available to each child for these purposes.

H. To borrow money on my behalf and encumber any assets in which I have an interest as security.

I. To manage my tangible personal property, including but not limited to moving, storing, selling, donating, or otherwise disposing of this property.

J. To invest and reinvest my funds in every kind of property, real, personal, or mixed, and every kind of investment, specifically including, but not limited to, corporate obligations of every kind; preferred or common stocks; shares of investment trusts, investment companies, and mutual funds; and mortgage participations, provided that persons of prudence would make such purchases for their own accounts.

K. To purchase, sell, invest, reinvest, and generally deal with all stocks, bonds, debentures, warrants, partnership interests, rights, and securities I own; to take any action with respect to such securities that I have the power to take, including but not limited to opening brokerage accounts, buying and selling, voting shares, acquiring or selling options; managing and controlling all partnership interests, including making all decisions I could make as a general partner, limited partner, or both; and executing all documents required of me as such partner.

L. To prepare and file all income and other federal and state tax returns that I am required to file; to sign my name on tax returns; to hire preparers and advisers and pay for their services; and to do whatever is necessary to protect my assets from assessments for income taxes and other taxes. My Agent is specifically authorized to receive confidential information; to receive checks in payment of any refund of taxes, penalties, or interest; to execute waivers of restrictions on assessment or collection of tax deficiencies and waivers of notice of disallowance of claims for credit or refund; to execute consents extending the statutory period for assessment or collection of taxes; to execute closing agreements under Internal Revenue Code §7121, or any successor statute; and to delegate authority or substitute another representative with respect to all above matters.

M. To have access to all of my safe deposit boxes; to contract with financial institutions for the maintenance and continuation of safe deposit boxes in my name; to add to and remove the contents of all such safe deposit boxes; and to terminate contracts for all such safe deposit boxes.

N. To use any credit cards in my name to make purchases and to sign charge slips on my behalf as may be required to use such credit cards; and to close my charge accounts and terminate my credit cards under circumstances where my Agent considers such acts to be in my best interest.

O. To direct the Trustee of my revocable Trust (Jane Johnson Revocable Trust, created _ _[*date*]_ _) to make gifts on my behalf from the Trust estate to or for my benefit or the benefit of any of my children.

P. To perform, execute, enter into, perform, and terminate any other act, deed, contract, matter, or thing, that in the opinion of my Agent is in the best interest of my estate or ought to be done, executed, or performed in conjunction with this power of attorney, of every kind and nature, as fully and effectively as I could do if personally present. The enumeration of specific items, acts, rights, or powers in this instrument does not limit or restrict the general powers granted to my Agent except where powers are expressly restricted.

Q. To commence enforcement proceedings, at my expense, against any bank, savings and loan association, or other person or entity that fails or refuses to honor this springing durable power of attorney.

3. If Michael Jones does not serve as my Agent or is not available for any reason, Karen Jones, residing at 1704 Grand Island Avenue, Santa Monica, California, home telephone (310) 555-5555, work telephone (310) 555-1111, cell telephone (310) 555-2222, shall serve as my Agent, with all of the rights and powers set forth herein. If Karen does not serve as my Agent or is not available for any reason, Jocelyn Carson, residing at 1444 Louisiana Lane, Santa Barbara, California, home telephone (805) 555-9696, shall serve as my Agent, with all of the rights and powers set forth herein.

4. My heirs, successors, and assigns shall be bound by the acts of the Agent serving pursuant to this springing durable power of attorney.

5. If any provision in this springing power of attorney is for any reason inapplicable or unenforceable, the remaining provisions shall nevertheless remain in full force and effect.

6. For the purpose of inducing any party to act in accordance with the powers granted in this springing durable power of attorney, I hereby represent, warrant, and agree that I and my heirs, distributees, legal representatives, successors, and assigns will hold such party or parties harmless from any loss suffered, or liability incurred, by such party or parties in acting in accordance with this durable power of attorney prior to that party's receipt of written notice of any termination. Any third party dealing in good faith with my Agent may conclusively rely upon, and need not inquire into, my capacity at the time this durable power of attorney is created, or at the time any action is taken pursuant to this springing durable power of attorney.

Date: _ _[*date*]_ _ _____

Jane Johnson

[*Acknowledgment; for form see §9.38*]

Comment: Some practitioners provide the principal, and in some cases the agent, with copies of the Probate Code sections that describe the powers identified with the terms used in the uniform durable power of attorney form. See Prob C §§4400-4465.

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Source: Estate Planning/Complete Plans for Small and Mid-Size Estates/10 Plan for Unmarried Person With Minor Children/§10.36 F. Form: Advance Health Care Directive

§10.36 F. Form: Advance Health Care Directive

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WARNING: This form is a sample based on the hypothetical in this chapter. The drafter should refer to the text of California Powers of Attorney and Health Care Directives, chaps 7-9 (Cal CEB 2008) before preparing an advance health care directive.

10.36-1 Advance health care directive

ADVANCE HEALTH CARE DIRECTIVE

(California Probate Code §§4600-4753)

WARNING TO PERSON EXECUTING THIS DOCUMENT

This is an important legal document. Before executing this document, you should know these important facts:

This document gives the person you designate as your agent the power to make health care decisions for you. Your agent must act consistently with your desires as stated in this document or otherwise made known.

This document gives your agent the power to consent to your doctor not giving treatment or stopping treatment necessary to keep you alive.

Notwithstanding this document, you have the right to make medical and other health care decisions for yourself so long as you can give informed consent with respect to the particular decision. In addition, no treatment may be given to you over your objection at the time, and health care necessary to keep you alive may not be stopped or withheld if you object at the time.

This document gives your agent authority to consent, to refuse to consent, or to withdraw consent to any care, treatment, service, or procedure to maintain, diagnose, or treat a physical or mental condition. This power is subject to the statement of your desires and the limitations that you have included in this document. In addition, a court can take away the power of your agent to make health care decisions for you if your agent (1) authorizes anything that is illegal, (2) acts contrary to your known desires, or (3) where your desires are not known, does anything that is clearly contrary to your best interests.

Your agent has the right to examine your medical records and to consent to their disclosure.

This document gives your agent the power after you die to (1) authorize an autopsy, (2) donate your body or parts thereof for transplant or therapeutic or educational or scientific purposes, and (3) direct the disposition of your remains.

Your agent's right to exercise all of the powers set forth in this instrument will exist for an indefinite period of time. However, you have the right to revoke the authority of your agent by notifying your agent or your treating doctor, hospital, or other health care provider orally or in writing of the revocation.

Your agent may need this document immediately in case of an emergency that requires a decision concerning your health care. Either keep this document where it is immediately available to your agent and alternate agents or give each of them an executed copy of this document. You may also want to give your doctor an executed copy of this document.

If you do not understand anything in this document, you should ask your lawyer to explain it to you.

DIRECTIVE

This document enables the individuals designated below to make health care decisions for me as permitted in California Probate Code §§4600-4753. This power of attorney shall remain in force for an indefinite period of time and shall not be affected by my subsequent incapacity.

Designation of Agent

I, Jane Johnson, a resident of Los Angeles County, California, appoint Karen Jones, 1704 Grand Island Avenue, Santa Monica, California, home telephone (310) 555-5555, work telephone (310) 555-1111, cell telephone (310) 555-2222, as my Agent to make health care decisions for me as authorized in this document.

General Statement of Authority

If I become incapable of making informed health care decisions, I grant my Agent full power and authority to consent, to refuse to consent, or to withdraw consent to any type of health care procedure, to the same extent that I could if I had capacity to do so, subject to the terms of this document.

The authority granted to my Agent includes but is not limited to the authority to consent to emergency care, hospitalization, surgery, therapy, or any procedure to maintain, diagnose, or treat any physical or mental condition.

I authorize my Agent to consult with and advise my physicians, nurses, therapists, dentists, and any other medical or health care personnel or institutions on my behalf, as such consultations relate to my health. All such personnel and institutions are directed to abide by all of my Agent's decisions and instructions and to release to my Agent all information that my Agent may request concerning my health and well-being.

I authorize my Agent to stay with me in a hospital (including the emergency room and intensive care or coronary unit), in the office of a physician or surgeon, or in any other facility.

Before making a health care decision, my Agent shall attempt to communicate with me regarding my desires unless such attempt would be futile. In such case, my Agent shall decide for me, having my best interests in mind, in accordance with my desires as known to my Agent and as expressed in this document. If my desires regarding a particular health care procedure are unknown, my Agent should make the health care decision guided by any preferences that I have previously expressed, my preferences stated in this document, and information received from my physicians regarding my prognosis.

Statement of Desires Concerning Life-Sustaining Treatment

If I have an incurable or irreversible physical or mental injury, disease, or condition and the application of life-sustaining procedures, including artificially administered nutrition and hydration, would serve only to prolong the moment of my death artificially, I direct that I be allowed to die without prolonging my life with medical treatment that does not benefit me.

If I have a terminal condition, I wish to receive treatment and care that will enable me to take part in activities of daily living, to eat, to drink, and to communicate meaningfully with others. I wish to make my own decisions regarding my treatment as long as I am able to do so. If I become incapacitated, I give my Agent full authority to make treatment decisions for me. In making such decisions, my Agent should consider that (1) I want to die a natural death without having my life prolonged by machines or nonbeneficial treatment, including artificially administered nutrition and hydration; (2) I want to live my life with dignity and for my loved ones to have pleasant memories of my final days; (3) I want to die free of unnecessary pain and suffering even if pain medication may lead to permanent damage, addiction, or hasten the moment of, but not intentionally cause, my death; and (4) I want my religious beliefs honored.

If I lapse into an irreversible persistent vegetative state or coma, I instruct my Agent to discontinue nutrition and hydration by artificial means as long as they are not necessary for comfort or alleviation of pain.

Alzheimer's Disease

If I develop Alzheimer's disease or other forms of irreversible dementia, I would like to receive all noninvasive life-prolonging treatments such as artificial nutrition, fluids, and antibiotics as long as I have the ability to interact meaningfully with family and friends. I do not want highly intrusive treatments such as cardiopulmonary resuscitation, mechanical ventilation, or kidney dialysis. If I lose the ability to interact meaningfully with others, I then want only treatments that will make me comfortable and free from pain.

Inspection and Disclosure of Medical Records

I authorize my Agent to request, review, and receive any information, verbal or written, regarding my physical and mental health, including but not limited to my medical and hospital records. I authorize my Agent to execute on my behalf any releases or other documents that may be required in order to obtain this information and to consent to disclosure of this information.

Signing Documents

I authorize my Agent to execute all documents that relate to my health care decisions, including but not limited to documents titled or purported to be a "Refusal to Permit Treatment" or "Leaving Hospital Against Medical Advice," and any necessary waiver or release from liability.

Selecting Facilities and Providers

I authorize my Agent to select and discharge physicians, dentists, nurses, therapists, and other health care providers and personnel. I authorize my Agent to choose hospitals and other health care facilities, and to admit me to and to effect my discharge from any hospital or other health care facility, including skilled nursing facilities and board and care facilities.

Autopsy, Anatomical Gifts, Remains

I wish to be an organ donor, but not a tissue donor, and I wish to have my remains cremated. I authorize and direct my Agent to make disposition of parts of my body under the California Uniform Anatomical Gift Act; and to direct cremation of my remains pursuant to California Health and Safety Code §§7100 and 7100.1 in accordance with these directions. The authority to control the disposition of my remains includes but is not limited to the authority to control the manner and conditions of my cremation, the right to control all aspects of my funeral and other memorial services, and the right to control disposition of my ashes. I also authorize my Agent to consent to an autopsy under California Health and Safety Code §7113.

When Agent's Authority Becomes Effective

My agent's authority shall become effective when my primary physician determines that I am unable to make my own health care decisions.

Alternate Agents

If at any time Karen declines or is unable to exercise the authority given herein, or if I revoke Karen's authority to act as my Agent, or if Karen is not present and cannot be reached by a health care provider at any of the telephone numbers specified in this power of attorney after a reasonable number of attempts based on the particular facts and circumstances dictating the need for an agent to act, then Michael Jones, 1704 Grand Island Avenue, Santa Monica, California home telephone (310) 555-5555, cell telephone (310) 555-3333, shall serve as my Agent, in the place of Karen, to make health care decisions for me as authorized in this document. Michael shall have all of the authority expressly conferred on Karen in this document. The health care provider is hereby relieved of any liability for relying on Michael's direction or instructions.

If at any time Karen and Michael decline or are unable to exercise the authority given herein, or if I revoke their authority to act as my Agents, or if they are not present and cannot be reached by a health care provider at any of the telephone numbers specified in this power of attorney after a reasonable number of attempts based on the particular facts and circumstances dictating the need for an Agent to act, then Jocelyn Carson, 1444 Louisiana Lane, Santa Barbara, California, home telephone number (805) 555-9696, shall serve as my Agent, in the place of Karen and Michael, to make health care decisions for me as authorized in this document. Jocelyn shall have all of the authority expressly conferred on Karen in this document. The health care provider is hereby relieved of any liability for relying on Jocelyn's direction or instructions.

Revocation of Prior Documents

I hereby revoke any prior power of attorney for health care.

Validity of Document

I intend that this Power of Attorney for Health Care be effective in all States. A photocopy of this document is valid and may be relied upon as if the original.

Enforcement of Wishes

If any health care provider fails to honor my wishes as stated in this document, I direct my Agent to take appropriate legal action, if necessary in my Agent's judgment, to enforce my right of self-determination as I have intended by executing this document.

If any health care provider refuses to honor my agent's decisions, I authorize my Agent to transfer my care to another health care provider who will honor my wishes. If my health care provider thwarts, undermines, or does not honor to the fullest extent my wishes or my Agent's decisions, I authorize my Agent to initiate an action for battery against the health care provider.

Declaration Regarding Warnings

I declare that my lawyer has explained to me my rights in connection with this instrument and the consequences of signing it and not signing it, and that I have read the warnings attached to the first page of this document.

Executed on _ _[*date*]_ _, at Los Angeles, California.

_____

Jane Johnson

[*Acknowledgment; for form see §9.38*]

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§10.37 G. Form: Transmittal Letter to Client

▶ To download **Word** version, right click and choose *Save Target As*

▶ To download **WordPerfect** version, right click and choose *Save Target As*

10.37-1 Transmittal letter to client

[*Attorney's letterhead*]

_ _[*Date*]_ _

Jane Johnson
123 First Street
Los Angeles, California 90025
Re: Estate Plan

Dear Ms. Johnson:

I enjoyed meeting with you last week to discuss your estate planning goals. Enclosed please find drafts of the following estate planning documents we discussed: (1) Nomination of Guardians; (2) Jane Johnson Revocable Trust; (3) Assignment to Trust; (4) Pourover Will; (5) Durable Power of Attorney for Financial Management; and (6) Advance Health Care Directive.

I prepared these drafts based on the documents you brought to my office and on the information you provided during our meeting about your current situation, your goals, and your concerns. Under current law, your estate would not be subject to an estate tax at your death. Tax laws change, however, and your financial situation might also change (for example, if you inherit significant assets at your parents' death). Once your estate plan is in place, it will be up to you to review it periodically and make changes as your situation and your finances change.

Please review these drafts carefully and contact me with your changes, corrections, and questions. In particular, please verify that the spelling of names is correct and that telephone numbers and addresses are accurate. Please make a note about any provision in these drafts that does not correctly set forth your wishes or that you do not understand. We will discuss such questions and make any necessary revisions before you execute the final drafts of these documents.

In addition, I will prepare a Deed transferring your condo to yourself as Trustee of your Trust and a Preliminary Change of Ownership Report (PCOR) for you to sign when you execute the other documents. We are required to submit the PCOR when we record your trust transfer deed. The PCOR informs the county assessor that you are transferring your condo to your revocable trust and that the transfer is not one that triggers reassessment of your real property taxes.

To assist you in reviewing the enclosed documents, I will briefly summarize the purpose of each draft. As you review these documents, keep in mind that some of the provisions may never have application to your particular situation but are included to address future contingencies that we cannot anticipate at this time. For example, your Durable Power of Attorney for Financial Management authorizes your agent to initiate litigation on your behalf to obtain benefits to which you may become entitled. While we do not anticipate that such litigation will ever be necessary, your agent is authorized to file such an action for you if the need arises. Also remember that the individuals you have named to make health care decisions for you have no authority to do so unless you become incapacitated and cannot make decisions for yourself.

You have selected your parents to act as your primary fiduciaries in many of these documents, the exception being the nomination of guardian of the person, because you believe they are in the best position to serve in such roles in the event you suffer untimely death or incapacity within the next few years. You have made that decision based on current circumstances, understanding that your parents may not be physically able to carry out the fiduciary responsibilities involved as they get older. We have discussed how important it

will be to regularly reconsider this issue as your parents age and circumstances change and make appropriate changes in your documents accordingly.

1. Nomination of Guardians: This document sets forth your choice of Nancy and Mike Sims to serve as guardians of the persons of your children in the event you and their father are not able to care for them. Your sister is nominated as the alternate. You nominate your father as guardian of the children's estates, if one is needed, with your mother and your sister as alternates.

2. Jane Johnson Revocable Trust: This document sets forth the terms for administration of trust assets during your lifetime and for administration and distribution of your trust assets to your beneficiaries after your death. This document provides that in the event of your disability, your trust assets will be managed for your benefit and for the benefit of your children until the children reach age 22. Upon your death, your assets will be distributed in equal shares to your children. If any child is not yet 35 years old at the time of your death, that child's share will remain in trust for that child until he or she reaches age 35. We discussed that if your children are relatively young at the time of your death, the division into separate trusts will require separate administrative costs, including the cost of separate tax returns, possibly for many years, but you still chose this distribution scheme. If any child dies before you and leaves surviving children, your grandchildren would inherit the share that would have been distributed to or for that child.

If you have no surviving children or grandchildren at the time of your death, your sister, her children, your parents, and your friend Nancy's daughter, Audrey, in that order, would be your beneficiaries.

You have named as successor trustee, in the following order of priority, first your father and then your mother, your sister, and your friend Nancy.

3. Trust Assignment: This document transfers ownership of the contents of your home, including those items that originally belonged to your grandparents, to your trust.

4. Will: This document provides that any assets held outside the trust, such as any automobile you own at the time of your death, will be distributed to your trust upon your death, <u>except</u> for assets you hold in joint tenancy with a surviving person and assets for which you have designated a beneficiary. Assets you hold in joint tenancy will pass to the surviving joint tenant and will not be controlled by your will. Assets for which you have designated a payable-on-death beneficiary, namely your 401(k) account, will be paid directly to the beneficiary and will not be controlled by your will.

5. Springing Durable Power of Attorney for Financial Management: This document authorizes the persons you have designated as agents—your father first and your mother and sister as the alternates—to manage your assets held outside of your trust in the event you become disabled.

6. Advance Health Care Directive: This document authorizes the persons you have designated as agents—your mother and then your father and your sister as the alternates—to manage your health care and to consent or refuse to consent to proposed medical treatment if you are unable to do so. The directive also expresses your desire not to be kept alive by machines in certain circumstances, with special instructions regarding your care if you have Alzheimer's disease, and with the direction that you wish to be an organ donor and that your remains be cremated.

In addition to these documents, to help implement your estate plan, you will be responsible for obtaining the papers necessary to transfer title to the brokerage account to the trust. Other assets, namely your life insurance and 401(k) account, will also require your attention.

As we discussed, because you have elected not to engage in any estate tax planning at this time, you will name your trust as the beneficiary of the life insurance policy you now have in place, as well as any policies you may later acquire. The beneficiary will be designated as follows: Jane Johnson Revocable Trust dated _____.

You will designate your children as the beneficiaries of your 401(k) plan, as well as any later-acquired retirement benefits or IRAs. The 401(k) beneficiary designation will include the proviso that if a child is under the age of 22, distribution will be to your father as custodian under the California Uniform Transfers to Minors Act for that child. Your mother will be named as the alternate custodian. Again, if your parents' health begins to deteriorate, you should change the designation of custodian for the 401(k) at the same time that you amend

your other estate planning documents. If Andrew or Amy dies before you, you will need to update your beneficiary designation.

If you obtain the forms required by your brokerage firm to transfer the account to your trust and necessary change-of-beneficiary forms for the life insurance policy and 401(k) in advance of the appointment at which you will sign the other estate planning documents, I will also supervise your completion and signing of those forms.

After you have had an opportunity to review the enclosed drafts carefully, please contact me to make an appointment to discuss your questions and to make revisions to your documents. We will then make an appointment, at which time you will execute all of the final documents at one time.

I look forward to hearing from you soon.

Sincerely,

__[*Signature*]__
_ _[*Typed name of attorney*]_ _

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11

Plan for Young Married Couple With Minor Children

Sandra Price

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§11.1 I. INTRODUCTION

Whether meeting with a married or unmarried client, a client with or without children, whether the client is young or old, and whether the client has a small, mid-size, or large estate, the attorney must gather complete and accurate information about the client and the client's assets, family members, possible beneficiaries, and possible fiduciaries. Verifying title to assets, obtaining approximate values of assets, and determining primary and contingent beneficiary designations is part of the process in every case. For discussion of these issues, see §§9.1-9.3. For a sample questionnaire to obtain such information that can be sent to the client in advance of the first meeting or used by the attorney at that meeting, see chap 8.

Any time an attorney represents a married couple, at the first interview the attorney must discuss potential conflicts of interest with the clients and obtain a written waiver. For a thorough discussion of conflicts waivers and sample forms, see chap 2.

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Source: Estate Planning/Complete Plans for Small and Mid-Size Estates/11 Plan for Young Married Couple With Minor Children/ II. PLANNING FOR YOUNGER COUPLE WITH MINOR CHILDREN/§11.2 A. The Hypothetical Clients: Dan and Sue Young

II. PLANNING FOR YOUNGER COUPLE WITH MINOR CHILDREN

§11.2 A. The Hypothetical Clients: Dan and Sue Young

Daniel Young is 35 years old and works driving a bus. He is married to Susan Young, who is 33 years old. Susan worked before marriage but now stays home with their children, planning to go back to work part time when both children are in school full time. They have been married for 10 years. Neither was previously married. They have a 3-year-old daughter, Tiffany, and a 5-year-old son, Jason.

All of their assets were acquired after they were married.

Dan and Sue both have parents who are relatively young and in good health and who will likely spend their assets in retirement. At this time, therefore, neither Dan nor Sue expects a significant inheritance.

Dan has one sister, Eunice Smith, age 38, who is married to Joseph; they have two children, ages 15 and 18. Eunice is a part-time bookkeeper; Joseph is an auto mechanic. Sue has one sister, Teresa Scott, age 30, who is unmarried and has no children. Teresa has a high-paying job as a computer programmer, and she does not like dealing with financial matters. She loves children and has often been a baby-sitter for Dan and Sue's children. She is the children's favorite adult after their parents. Dan and Sue get along well with their siblings and their in-laws.

The following is a listing of Don and Sue's assets:

Title	Date Acquired & Basis (if applicable); Debt	Description of Asset/Interest	Approx. Current Value
Daniel Young and Susan Young, Husband and Wife, as joint tenants	Purchased in 2005 for $600,000; Debt: $400,000	Residence located at 123 Main St., Sacramento, California	$500,000
Dan Young or Susan Young, joint tenants		Bank savings account	35,000
Dan Young or Susan Young, joint tenants		Bank checking account	5,000
Daniel Young		IRA: Sue is beneficiary	20,000
Susan Young		IRA: Dan is beneficiary	12,000
Daniel P. Young		401(k): Susan is beneficiary	15,000
Dan Young		1998 Toyota Corolla	2,000
Susan Young		2001 Ford Taurus	4,000
[None]		Furniture and furnishings, and personal effects	nominal
Daniel P. Young, insured		Life insurance through employment: Susan is beneficiary	50,000

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§11.3 B. Determining Client's Goals and How to Achieve Them

In addition to obtaining the information about Dan and Sue's assets and family, the attorney should discuss their objectives. Typically, young couples want to provide for the survivor of them and ensure that their children will receive assets not needed by the surviving spouse. However, the attorney should confirm that there are no other goals, unusual family circumstances, or other issues that would affect the estate plan. It is the attorney's function to explain alternatives that might achieve the client's goals. Formulating the plan to implement Dan and Sue's goals is the subject of the rest of this chapter.

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§11.4 C. Guardianship of the Person and Estate if Children Are Minors

Dan and Sue, as parents, have custody of their children and have responsibility for the day-to-day care and upbringing of the children. However, to prepare for the possibility that they both may die before the children reach the age of 18, Dan and Sue need to think about who will raise their children and manage the assets the children will inherit until the children attain the age of majority (18 in California).

A guardianship proceeding is the court proceeding in which a guardian is appointed by the probate court to protect the person or estate of a minor. See Prob C §1510. Dan and Sue's estate planning documents will include provisions by which they nominate the persons they wish to raise their children and handle the children's inheritances if they are both deceased. Their attorney, however, should explain that their nominees for guardian of the person or the estate have no authority until a court appoints them following a judicial determination that they are appropriate and fit to serve as guardians. For further discussion of guardianships, see California Guardianship Practice (Cal CEB Annual).

If Dan and Sue's estate plan puts inherited assets in trust for their children during their minority, there will probably be no need for a guardian of the estate to be appointed, but it is a good idea for Dan and Sue to nominate a guardian of the estate in any event. This will give the court the benefit of their thinking in the event that circumstances change and a guardian of the estate is required. Dan and Sue decide that the person named as trustee of the trusts that will hold the assets passing to their minor children should also be the person they nominate as guardian of the estate. For the reasons discussed in §11.22, Eunice would be the best person to act as guardian of the estate.

A court-appointed guardian of the person would be required if Dan and Sue die while any child is a minor. The guardian of the person will have the care and custody of any minor child, and Dan and Sue want their children to live with family members. Although Dan's and Sue's parents are still relatively young, they are just beginning to enjoy their retirement years and Dan and Sue do not want to burden their parents with the responsibility for raising their young children. Eunice and Joseph, with two teenagers, have confided to Dan and Sue that they are looking forward to a time when their children will both be leaving home. Teresa's relationship with Dan and Sue's children makes her the logical person to nominate as guardian of the person. At their attorney's urging, Dan and Sue have talked to Teresa about being named guardian of the person, and Teresa is willing to assume that responsibility, should it become necessary.

The attorney has explained to Dan and Sue that Teresa, as guardian of the person of a minor child of theirs, would not be legally obligated to use her own funds to care for the minor child. The attorney also discusses with Dan and Sue that they may therefore want to consider including provisions that would minimize the financial burden to Teresa of raising Tiffany, Jason, or any future child until such child attained the age of majority. Dan and Sue would like such a provision to be included in their wills, as part of the terms of the trusts for their children (see §§11.8-11.9).

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D. Formulating the Estate Plan for Asset Management and Distribution

1. Beneficiaries

§11.5 a. Spouse

As young couples with children usually do, Dan and Sue want to leave all of their assets to the survivor of the two of them at the first death. However, there are a number of issues that their attorney should raise that will help determine the type of documents and the content of the provisions that should be drafted. Often, the clients are unaware of some of these issues or have not thought about them.

For example, if either Dan or Sue dies soon, the other would have total control of all their combined assets, and all of the deceased spouse's assets might not ultimately pass to Tiffany and Jason. The surviving spouse, still young, might wish to benefit other members of his or her family, or might wish to remarry or have other children; or the surviving spouse might decide to leave significant assets or everything to charity. If any of these possibilities is a concern, the attorney must discuss the drafting possibilities, such as a trust that would allow the first spouse to die to provide for the surviving spouse but still direct the disposition of assets remaining at the surviving spouse's death.

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§11.6 (1) Estate Tax Issues

The attorney should explain to Dan and Sue that at this point in their lives, estate tax planning does not appear to be an issue. There would be no estate tax on the first death because of the estate tax applicable exclusion amount (IRC §2010) and the unlimited marital deduction (IRC §2056(a)). Planning to eliminate estate tax at the second death is probably not necessary because the value of their combined assets will likely be covered by the applicable exclusion amount. See chap 3. These concepts should be explained in basic terms and Dan and Sue should be advised at the interview, in the transmittal letter that will accompany the drafts, and in the final closing letter that the issue of estate taxes should be revisited periodically as the tax laws change and the nature and value of their assets change.

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Source: Estate Planning/Complete Plans for Small and Mid-Size Estates/11 Plan for Young Married Couple With Minor Children/§11.7 (2) Need for Additional Insurance

§11.7 (2) Need for Additional Insurance

Often, a young couple like Dan and Sue with small children have few liquid assets that the survivor could use for living expenses if one of them dies soon. The attorney should discuss this with them as part of the estate planning process. In particular, without Dan's salary, Sue would have a difficult time paying the mortgage and staying home with the children. Even if she worked part time, it would be difficult to maintain a comfortable life for herself and the children. Similarly, Dan's life as a single parent working full (or part) time would not be easy.

Dan's current life insurance of $50,000 seems inadequate. The attorney should discuss the possibility of obtaining additional insurance on Dan's life and obtaining insurance on Sue's life. Because they are young and in good health, they should be able to obtain this insurance through Dan's work or from a private carrier. An insurance agent can help them determine the appropriate amount. There are also many online resources for determining an appropriate amount of insurance to purchase. It may be that term insurance, which would cost substantially less than whole life or other types of life insurance, would be sufficient.

PRACTICE TIP: The attorney is not a financial adviser. It is not the attorney's role to recommend the type of insurance or the amount that might be appropriate for a young couple. It is appropriate, however, to raise the issue and advise the clients to seek information and advice from reliable insurance professionals or financial advisers or planners.

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§11.8 b. Children: Planning Options to Consider

Dan and Sue, in considering the possibility that they may both die early, want to make sure that Tiffany and Jason do not receive their inheritances at too young an age. The attorney should discuss the advantages and limitations of the following available alternatives:

Outright distribution. Outright distribution provides no management after age 18, and if a child is under 18, a court-supervised guardianship will be required. This is the most expensive and administratively burdensome alternative while the children are young.

Distribution to a California Uniform Transfers to Minors Act (CUTMA) (Prob C §§3900-3925) account. A CUTMA account provides management until any age between 18 and 25, as selected by Dan and Sue. A separate CUTMA account would be required for each child. An advantage of distribution to a CUTMA account is its simplicity: No additional drafting is required. The statute contains all of the provisions governing the management and distribution of the assets in the account.

Distribution to a trust. A trust provides management until any age selected by Dan and Sue, and can include tailored provisions describing how to hold, manage, and distribute the trust assets. One option is to provide for a separate trust to be created for each child immediately at the second death; alternatively a "pot trust" can be created that will benefit both of the children until a specified time, after which the pot trust will be divided into separate shares, one share for each child.

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§11.9 c. Dan and Sue's Decisions About Spouse and Children

Even after the attorney has explained that a decision to leave everything to each other might place their children's inheritance at risk (see §11.5), Dan and Sue both feel comfortable that the other would provide for Tiffany and Jason. Accordingly, they agree to leave everything to the survivor of the two of them.

Because their children are so young, Dan and Sue decide that a pot trust will be best because it most closely approximates how they would manage their money for their children, *e.g.,* paying for braces for one child and music lessons for the other, without artificially dividing available resources into separate funds for each child. It would also allow each child to finish school before the remaining resources are divided between the two.

Dan and Sue also decide that they want to maintain the pot trust until Tiffany (or any later-born child) reaches age 21. At that time, the trust will terminate and be distributed outright in equal shares to Tiffany, age 21, and Jason, age 23 (assuming no later-born children). Dan and Sue, who married young and learned financial responsibility at an early age, believe that Tiffany and Jason will be mature enough to handle their inheritances at those ages.

Before the trust terminates, distributions would be made for the support of the children (*e.g.,* for living expenses and medical and educational expenses) as necessary. The attorney should ask whether Dan and Sue want a broad definition of educational expenses that would include, *e.g.,* vocational education or professional training in one of the arts. Because Don and Sue do not know what their children's interests might be as they get older, they want to include a very broad definition.

Because the children are so young, Dan and Sue find it difficult to think about providing for grandchildren. On the advice of their attorney, however, they decide that their wills should each provide for the children of a *deceased* child. They include provisions that not only would distribute a deceased child's share to his or her children when the estate (or trust) is distributed outright, but would also permit distributions from the pot trust to or for the benefit of any children of Jason or Tiffany who survive them. Dan and Sue recognize that this might put the trustee in a difficult position. For example, if Dan, Sue, and Jason all die before Tiffany is 21, and Jason leaves an infant child, the trustee of the pot trust may have to decide between making distributions for the support of Jason's young child or for Tiffany's college education. However, Dan and Sue believe that the trustee they have chosen will be able to make these difficult family decisions as they would if they were alive. Nevertheless, their attorney should advise them to revisit these provisions in the future to make sure that they continue to reflect their wishes.

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§11.9A d. No Other Immediate Beneficiaries

The attorney discusses with Dan and Sue whether they wish to benefit anyone other than the immediate family, such as friends, other family members, or charities. Dan and Sue do not wish to make any such bequests at this time although they may revisit this issue in the future.

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§11.10 e. Decisions About Contingent Beneficiaries

The attorney must ask what Dan and Sue wish to happen if their descendants are deceased when the surviving spouse dies or if Dan, Sue, and their descendants have all died before full distribution of the assets. Dan and Sue want their assets to be distributed as follows:

- One-third is to go to Teresa, Sue's sister, and if she is not then living, to her issue, if any, by right of representation (although Teresa does not now have any children, she is still relatively young). If Teresa is not then living and leaves no surviving children, Dan and Sue want Teresa's share to be distributed to Sue's parents, and if they are not living, to Eunice or to her children if she is not living.
- Two-thirds are to go to Eunice, Dan's sister, and if she is not then living, then to her descendants by right of representation, and if none, then to Dan's parents, and if they are not then living, then to Teresa.
- Any assets not distributed to these family members are to be distributed in equal shares, one-half to Dan's heirs and one-half to Sue's heirs.

Dan and Sue have decided on this unequal division between their families because Teresa, who has a high-paying job and no dependents, is financially secure, while Eunice's family is struggling to save enough to pay for college for their two children. Dan and Sue recognize that their plan benefits one side of the family more than the other, but they are comfortable with that outcome.

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§11.11 f. Will or Revocable Trust: Dan and Sue's Decision

The attorney should explain to Dan and Sue that their distribution plan can be included either in:

- Wills (which can include testamentary trusts for their children, if necessary); or
- A revocable trust (which can also include trusts for their children, if necessary) with pourover wills.

The major advantages of a revocable trust are:

- It would avoid probate at both deaths if properly funded. (During the interview with Dan and Sue, the attorney should discuss the probate considerations noted in §§9.8-9.10.)
- It would provide for management of trust assets in the event of incapacity of either or both.
- The trust document would not typically become a public record.

However, Dan and Sue think that a trust sounds too complicated for their circumstances. First, there are additional costs in preparing and funding a revocable trust. Also, holding title in trust can sometimes create additional work when dealing with third party institutions such as banks or brokerage firms. For example, in refinancing a home, the lender may require Dan and Sue to transfer title of the house out of the trust to their individual names.

The advantage of a will is that there is no need to transfer assets to a revocable trust during their lifetimes and it is generally less expensive to prepare a will than a revocable trust instrument with a pourover will.

Dan and Sue decide that wills with testamentary trusts will meet their needs at this stage in their lives. They understand that they will be reviewing their estate plan periodically and may decide at some future date to create a revocable trust.

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Source: Estate Planning/Complete Plans for Small and Mid-Size Estates/11 Plan for Young Married Couple With Minor Children/§11.12 2. How the Plan Will Be Implemented

§11.12 2. How the Plan Will Be Implemented

After decisions have been made about which documents will accomplish Dan and Sue's goals, it is also necessary to review each of their assets and decide whether changes in title should be made.

Residence. The attorney should discuss with Dan and Sue whether title to the residence, which they currently own as joint tenants, should be changed to community property with right of survivorship. At the first death, this will ensure that the house passes to the survivor immediately. It will not be governed by the decedent's will. At the second death, it will be governed by the survivor's will and will pass to the children equally (or to the pot trust if the youngest is not yet 21). Although both joint tenancy and community property with right of survivorship have the same feature of automatically passing the residence to the survivor at the first death, confirming the community property nature of the residence may be important for income tax purposes if the value of the residence appreciates. Community property will receive a step-up in basis of both halves of the property at the first death if the property has appreciated in value between acquisition and death. See chap 3. The property will not be reassessed for property tax purposes if the property passes to a spouse or children. See chap 3.

Dan and Sue believe that the property will appreciate over time and decide to change title from joint tenancy to community property with right of survivorship. The attorney will prepare a deed transferring title to the house and a Preliminary Change of Ownership Report (PCOR) (see chap 12). The attorney will have the deed recorded; the PCOR will be submitted with the deed to the recorder's office and then transmitted by the recorder's office to the assessor's office. The attorney will obtain stamped copies for his or her own records to show that the deed has been recorded, but will have the original returned to the client once it is processed by the recorder's office. See chap 12.

Joint tenancy bank savings and checking accounts. Each of these accounts will remain a joint tenancy asset, not governed by the decedent's will, but passing to the survivor at the first death. Because these are cash accounts, and therefore there is no appreciation or depreciation, there is no concern about income tax basis.

Cars. Title to the cars should be transferred to both names so that at the death of either spouse, the other will automatically inherit the interest of the deceased spouse. Dan and Sue will be responsible for obtaining the proper forms from the Department of Motor Vehicles (DMV), filling them out, and submitting them to the DMV. If they belong to the California State Automobile Association (CSAA) or Southern California Automobile Association (SCAA), they probably can get help in changing title from that organization.

Life insurance. Dan should make sure that Sue is the beneficiary of his employment-based life insurance policy and any other policy he may obtain, as recommended by the attorney. The children should be named as alternate beneficiaries, provided, however, that if any child is under age 21, the trustee of the testamentary trust under Dan's will should be the next alternate beneficiary. Finally, "my issue by right of representation" should be named as the last alternate beneficiary. In this way, the proceeds will be added to the pot trust if it then exists and, if not, it will be paid to Dan's children (or other descendants if a child is not then living). Because the amount of the life insurance will be increased and is expected be a significant amount, it is appropriate that the proceeds be held in the trust to manage and protect it for the children. If Sue also obtains life insurance, she should name Dan and then follow the same order of alternate beneficiaries as Dan names.

CAVEAT: Some insurance companies may require a judicial determination of the identities of "issue" before releasing funds if no spouse or child survives and a portion of the proceeds is to be distributed to "my issue by right of representation."

Retirement benefits and IRAs. For each account or benefit, the attorney should advise Dan and Sue to obtain from the plan administrator a change-of-beneficiary form and make sure that, in addition to designating their respective spouse as the primary beneficiary, they name an alternate beneficiary. The attorney recommends naming the children as alternate beneficiaries, with a proviso that if a child is under 21, a custodian for the child under CUTMA (see §11.8) should be named as the beneficiary. Currently, the amount of benefits that would be payable to the children from retirement benefits and IRAs if both Dan and Sue are deceased is relatively modest. Simply naming the children as

alternate beneficiaries might require the creation of a guardianship solely for these benefits if one of the children is still a minor at the time he or she inherits; naming the testamentary trust as alternate beneficiary might introduce a level of complexity not warranted for these assets. Thus, naming the children and providing for a custodian if the child is a minor is a reasonable alternative at this time. Dan and Sue should be cautioned, however, that this arrangement should be reviewed in the future if these benefits increase in value.

For full discussion of implementing an estate plan, see chap 12.

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§11.13 3. Who Will Control Decisions About Dan and Sue's Assets

The attorney should explain to Dan and Sue the various roles and titles of the person or persons who will control their assets:

- In the event one or both of them becomes incapacitated or chooses to relinquish control; and
- After their deaths.

While they are alive and have capacity, Dan and Sue will retain control and management of their assets. To prepare for the possible incapacity of one or both, however, they need to designate those persons who will have authority over their assets.

Dan and Sue need to decide who will administer and distribute their estates at the first death and then at the second death. At the second death, they also need to designate who will continue to manage property left to any child who is still under age 21.

For general considerations in selecting fiduciaries that the attorney should discuss with Dan and Sue, see §§9.21-9.23.

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a. While Either Spouse Is Alive

§11.14 (1) Each Has Control of Community Property

If either Dan or Sue becomes incapacitated, the other spouse would have control over community property. This is not a complete solution, however, because certain actions, *e.g.,* those concerning real property transactions or gift transactions, would require court authority under Prob C §§3100-3113. Because of the necessity that at least one spouse have legal capacity and the possible requirement of a court order, these statutory provisions should be supplemented by other methods for asset management in the event of incapacity. A durable power of attorney will allow one spouse to act for the other without the need for a conservatorship or a court order.

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Source: Estate Planning/Complete Plans for Small and Mid-Size Estates/11 Plan for Young Married Couple With Minor Children/§11.15 (2) Durable Power of Attorney

§11.15 (2) Durable Power of Attorney

If Dan or Sue becomes incapacitated, rather than relying on the statutory authority and procedure of Prob C §3100, the spouse can be named as the agent (also known as the attorney-in-fact) under a durable power of attorney. Dan and Sue agree that each will designate the other as his or her agent and that the agent's power will be effective immediately. See §9.25 for discussion of "springing" powers of attorney.

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§11.16 (a) Alternate Agents

It is always advisable to name an alternate agent in the event that the spouse is unable for any reason to act or continue to act as agent. One related issue the attorney should discuss with Dan and Sue is whether the alternate's powers will be springing or effective immediately and, if springing, what will trigger its effectiveness. Dan and Sue are reluctant to give an immediate power to anyone other than themselves, and decide that they want a springing durable power of attorney for a nonspouse agent. With respect to determining incapacity for purpose of the springing power, they trust the medical profession and would prefer that their respective doctors make the determination rather than a family member. For discussion of considerations in selecting provisions regarding incapacity, see §9.20.

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§11.17 (b) Powers of Agent

The attorney should specifically warn Dan and Sue that the durable power of attorney is a powerful tool that can be abused (either intentionally or unwittingly) in the wrong hands. Dan and Sue trust each other and the persons they will be naming as alternate agents and do want the agent to have the broadest powers possible so the agent can handle any situation that may arise.

Dan and Sue ask whether an agent will be able to use their funds to pay for their children's support and living expenses. The attorney should explain that express provisions allowing or directing the agent to make distributions for the benefit of the children typically are not included, because it is the legal responsibility of parents, while living, to support their minor children. Fam C §§3900, 3901.

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§11.18 (c) Statutory Form or Attorney-Drafted Form

Either a statutory form power of attorney for financial and property management or a power of attorney custom-drafted by the attorney can be used. Because it is less expensive and because Dan and Sue are young and their situation is not complex, it does not appear that attorney-drafted durable powers of attorney are necessary. Also, third parties, such as banks, are familiar with the statutory form and may be more likely to honor it without additional inquiry (*e.g.,* sending it to their legal department for review). The attorney should review the powers granted in the statutory form during one of the meetings with Dan and Sue before they sign their documents.

For discussion of powers that must be specifically included in the statutory form power of attorney in order for an agent to exercise them, see §9.27.

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Source: Estate Planning/Complete Plans for Small and Mid-Size Estates/11 Plan for Young Married Couple With Minor Children/§11.18A (d) Consent of Agent; Advising Agent

§11.18A (d) Consent of Agent; Advising Agent

There is no requirement that the agent sign the durable power of attorney form (whether statutory or attorney-drafted) to indicate his or her consent to serve. A durable power of attorney is a unilateral grant of authority, not a two-party contract. Some attorneys, however, do include a signature line so that the agent can indicate that he or she accepts appointment. See California Powers of Attorney and Health Care Directives §§4.30-4.31 (Cal CEB 2008) for further discussion and form.

A related issue is whether Dan and Sue will advise their agents that they have been named.

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§11.19 (3) Personal Care Decisions

Other decisions that may need to be made in the event of incapacity concern "personal care decisions," such as determining where a person will live, choosing caretakers, selecting clothing, and so forth. See §9.28. These decisions frequently fall in the boundary between financial and health care decisions and may be included in the powers given to an agent under either an advance health care directive or an agent under a durable power of attorney for property management. Dan and Sue agree that these are important powers and should be included in the durable power of attorney for property management.

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§11.20 (4) Nomination of Conservator

The attorney should explain to Dan and Sue what conservators are and that the purpose of a durable power of attorney is to avoid the need to appoint a conservator in the event of incapacity. See §§7.11A (conservator of the estate), 7.64 (conservator of the person), 9.30 (brief description of the grounds for appointment of a conservator of the person, estate, or both).

Although a durable power of attorney should eliminate the need for a conservator, Dan and Sue are advised to take the precaution of adding provisions to the power of attorney form to nominate conservators of the person and estate. If for some unexpected reason (*e.g.,* an unusual transaction not authorized by the power of attorney) it becomes necessary for a conservator to be appointed, the court will have the benefit of knowing the client's wishes regarding the nominee and intended broad scope of authority over assets.

The nominations of the conservator of the estate and person could be included in a stand-alone document, in an advance health care directive, or in the financial power of attorney. Including the nominations in an advance health care directive (AHCD), however, may cause unintended consequences. If, for example, a health care emergency arises requiring immediate hospitalization, the client's AHCD may inadvertently be replaced by one in which no conservator of the person or estate is nominated and which states that any previously executed AHCD is revoked. Unfortunately, the forms used often do not provide for nomination of a conservator. For example, the current California Medical Association AHCD does not contain an item specifically for nomination of a conservator.

The attorney should also discuss with Dan and Sue any of the other issues mentioned in §9.30 that the attorney thinks would be helpful.

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§11.21 (5) Dan and Sue's Decisions

Dan and Sue will name each other as the agent under their durable powers of attorney. A question is whether Dan and Sue want to have the same or different alternate agents. The logical alternate for each of them would be his or her sister. However, because all of their property is community property, it might be inefficient to have Eunice controlling Dan's affairs and Teresa controlling Sue's if both Dan and Sue were to become incapacitated. Dan and Sue agree to name Eunice first and Teresa second as their alternate agents and as their nominees for conservator of the estate.

Because the responsibilities of the conservator of the person are of a personal nature and may require a good deal of personal supervision, Dan will name his sister, Eunice, as his first alternate. Sue will name her sister, Teresa, as her first alternate; Eunice and Teresa get along well, so Sue is confident that there will not be a problem between Eunice and Teresa if Eunice is called on to act as successor agent and is appointed conservator of the estate and Teresa is appointed conservator of her person.

Dan and Sue decide to advise Eunice that she is named as successor agent under each of their durable powers of attorney. Although Eunice would likely not serve in this capacity for many years, if at all (Dan or Sue would serve first, if and when needed, and circumstances may change), Eunice is being named to a number of fiduciary roles, and Dan and Sue will discuss the various roles with Eunice.

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§11.22 b. At Death

Dan and Sue probably have heard the term "executor" but are unsure what the difference is between an executor, agent, and conservator. Their attorney should explain that the executor is responsible for administering the decedent's estate to the extent that the deceased person's assets are subject to his or her will. Unlike the role of an agent under the power of attorney, the executor's job does not begin until the decedent dies and only after a court appoints him or her to that position. Dan and Sue will nominate the person(s) each wants to be his or her executor, but that person will not be an executor until a probate proceeding is commenced and the court issues an order appointing the executor.

At the death of the first of them to die, Sue and Dan naturally name the other as executor. The surviving spouse will be familiar with the assets and no other family member or other person will need to become involved at the first death. However, to address the issue of the second death, or the possibility that the surviving spouse may not be able to serve, Dan and Sue need to select a successor executor. Some of the things Dan and Sue should consider with respect to their immediate family members (their logical choices for successors) are Teresa's work commitments, her expressed desire to help Dan and Sue in any way she can despite her distaste for financial matters, and Eunice's family commitments and bookkeeping background. In the end, they decide to name Eunice as the first successor executor and Teresa as the second.

See §9.31 regarding considerations of executor compensation.

Dan and Sue also need to consider whether the executors they nominate should be bonded or whether they wish to state in their respective wills that the requirement of obtaining a bond is waived. A bond functions like insurance: for a fee, the bonding company agrees to guarantee the faithful performance of duty by the executor. Under California law, a bond is generally required to secure the performance of an executor unless the will waives bond or the beneficiaries consent to the executor's serving without bond. The cost of the bond is an expense paid by the estate. That is, any fees paid to the bonding company would reduce the assets that Dan and Sue can pass to each other (or to their children at the second death). Dan and Sue decide that they trust each other and their sisters to serve as executors and that their wills should accordingly include a provision waiving bond.

If at the second death one of Dan and Sue's children is not yet 21, the testamentary trust will be created. For the same reasons that Dan and Sue have named Eunice as the first to serve as alternate agent under the power of the attorney for financial management, guardian of the estate, and executor of the will, Dan and Sue decide to name Eunice as the trustee of the testamentary trust, with Teresa as the alternate trustee.

If, at the second death, Tiffany and Jason (and any later-born child) have reached age 21, any life insurance proceeds and retirement benefits and IRAs belonging to Dan or Sue will be distributed to the children as the designated alternate beneficiaries of these assets. As to any retirement benefits or IRAs, the share of any child who has not reached age 21 will be distributed to a custodian under the California Uniform Transfers to Minors Act (CUTMA) (Prob C §§3900-3925) for that child until that child reaches age 21. Consistent with their other decisions, Dan and Sue name Eunice as the CUTMA custodian, with Teresa as the successor custodian if for any reason Eunice does not serve or does not continue to serve.

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Source: Estate Planning/Complete Plans for Small and Mid-Size Estates/11 Plan for Young Married Couple With Minor Children/§11.23 E. Formulating the Estate Plan for Health Care Decisions

§11.23 E. Formulating the Estate Plan for Health Care Decisions

No estate planning consultation is complete without a discussion about how health care decisions will be made if either Dan or Sue is unable to make such decisions personally. The attorney should explain that California law allows any adult to execute a written advance health care directive (AHCD), which can include either or both of the following (Prob C §§4605, 4629):

- A power of attorney naming someone to make health care decisions; and
- Health care instructions (including "pull the plug" instructions).

Dan and Sue's attorney generally uses the California Medical Association form, which contains both options, because it is recognized by health care providers throughout California and is often more readily accepted than less familiar forms. The attorney should review the form with them and make sure they understand that they can choose to fill out either part or both parts.

NOTE: For discussion of nominating conservators of the estate and the person in the power of attorney for property management, see §11.20.

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§11.24 1. Statement of Wishes

The attorney uses the California Medical Association (CMA) form of Advance Health Care Directive on the theory that it is familiar to doctors and hospitals (an advantage in an emergency situation). The CMA form provides additional space to include specific, personal directions and wishes, and the attorney discusses the possibility of including these with Dan and Sue. Because Dan and Sue are healthy, with no medical conditions requiring particular instructions, they do not want to include any instructions; they want to leave the document as broadly worded as possible. If Dan or Sue did have special health care concerns, the attorney should suggest that they discuss these issues with the appropriate physician and add specific language to the CMA form.

Neither Dan nor Sue wants to be kept alive artificially and neither wants to be an organ donor. They do want to fill out the form regarding these issues. They have not decided whether they want to be buried or cremated and decide not to make any statement about that.

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Source: Estate Planning/Complete Plans for Small and Mid-Size Estates/11 Plan for Young Married Couple With Minor Children/§11.25 2. Agent Under Power of Attorney for Health Care Decisions

§11.25 2. Agent Under Power of Attorney for Health Care Decisions

For discussion of the issues that should be discussed with Dan and Sue regarding the choice of their agents under the power of attorney for health care decisions, see §§9.35-9.36.

Dan and Sue will each name the other as agent, knowing that they have the same views about health care and end-of-life issues. Each wants his or her sister to be named as the first alternate agent and his or her mother as the second alternate. They are confident that their named successor agents would follow their wishes.

There is an option on the California Medical Association form to make the power of attorney for health care decisions effective immediately. Neither Dan nor Sue sees any reason to allow another to make health care decisions for either of them while they have the ability to do so, and this option is not selected.

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Source: Estate Planning/Complete Plans for Small and Mid-Size Estates/11 Plan for Young Married Couple With Minor Children/§11.26 III. SAMPLE FORMS

§11.26 III. SAMPLE FORMS

In addition to Dan's and Sue's wills, durable powers of attorney for property management, and advance health care directives, the attorney will prepare:

- A deed transferring the property from Dan and Sue as joint tenants to Dan and Sue, husband and wife, as community property with right of survivorship (see §11.27);
- A Preliminary Change of Ownership Report (PCOR) (see §12.57); the attorney will fill in the information on the top part of page 1 of the form and check the "Yes" box in PART 1, Item A (transfer solely between husband and wife), the "No" box for the other Items in PART I, and fill in the Certification on page 2 except for the signatures of Dan and Sue;
- A transmittal letter that will include (see §11.32):
- Instructions about re-registering the cars in both names; and
- Sample language to designate children as alternate beneficiaries of IRAs, retirement benefits, and life insurance policies.

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Source: Estate Planning/Complete Plans for Small and Mid-Size Estates/11 Plan for Young Married Couple With Minor Children/§11.27 A. Form: Grant Deed

§11.27 A. Form: Grant Deed

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11.27-1 Grant deed

RECORDING REQUESTED BY
AND WHEN RECORDED MAIL TO:

Daniel P. Young and Susan Young
123 Main Street
Sacramento, CA 95825

MAIL TAX STATEMENTS TO:
Same as above

_____

SPACE ABOVE THIS LINE FOR RECORDER'S USE

Documentary Transfer Tax is -0-. TRANSFER NOT PURSUANT TO SALE; NO CONSIDERATION; THIS CONVEYANCE CHANGES THE MANNER IN WHICH TITLE IS HELD, WITH GRANTORS AND GRANTEES REMAINING THE SAME

Signature of Declarants: _____

GRANT DEED

DANIEL P. YOUNG and SUSAN YOUNG, husband and wife, as joint tenants ("Grantors"), hereby GRANT to: DANIEL P. YOUNG and SUSAN YOUNG, husband and wife, as their community property with right of survivorship ("Grantees") all that certain real property situated in the City of Sacramento, County of Sacramento, State of California, more particularly described as follows:

SEE LEGAL DESCRIPTION ATTACHED HERETO AS EXHIBIT A AND INCORPORATED HEREIN.

Commonly known as: 123 Main Street, Sacramento, California 95825

A.P.N.: 123-45-6789

Grantors declare that, under California Family Code Section 852, they make, join in, consent to, and accept this deed for the purpose of transmuting joint tenancy property to community property with right of survivorship.

Grantees declare that they accept this transfer with the intention of taking title to the above-described property as community property with right of survivorship.

Date: _____ **_____**
DANIEL P. YOUNG

Date:_____ **_____**
SUSAN YOUNG

[*Acknowledgments; for form see §9.38*]

Comment: Exhibit A containing the complete legal description of the property should be attached. Both signatures must be notarized.

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Source: Estate Planning/Complete Plans for Small and Mid-Size Estates/11 Plan for Young Married Couple With Minor Children/§11.28 B. Form: Will of Daniel Young

§11.28 B. Form: Will of Daniel Young

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▶ To download **WordPerfect** version, right click and choose *Save Target As*

Description of document:

This form provides a suitable framework for a will that contains a testamentary trust established by a married person with children, in this case minor children. The testamentary trust will only be created if there is no surviving spouse and if any child of the testator has not yet reached the age for final distribution of assets to him or her.

WARNING: This form is a sample based on the hypothetical in this chapter only. The drafter should refer to the text of California Will Drafting (3d ed Cal CEB 1992) for detailed guidance in preparing wills.

References: As an aid to the reader, the following list contains cross-references to chapters in Will Drafting that contain additional sample provisions and in-depth discussion of how they should be used. See also Will Drafting, Appendix C (Nontrust Will for Married Couple With Children: Contingent Family Pot Trust).

Topic	*Will Drafting Chapters*
Introductory clauses	10
Revocation of prior will	9
Gifts of property	8
Trusts for children	22
Nomination of executor	32
Executor powers and duties	33
Execution	36

11.28-1 Will of Daniel Young

I, DANIEL YOUNG, also known as DANIEL P. YOUNG, a resident of Sacramento County, California, declare that this is my Will. I revoke all Wills and Codicils that I have previously made.

1. FAMILY DECLARATIONS

1.1 Spouse. I am married to SUSAN YOUNG and all references to "my spouse" in this Will are to SUSAN YOUNG.

1.2 Children. I have two children, both of whom are now living, whose names and birth dates are:

JASON YOUNG April 4, 2004

TIFFANY YOUNG April 15, 2006

All references in this Will to "my child" or "my children" are to the children named above and any children hereafter born to or adopted by me.

I have no deceased children.

2. NOMINATION OF EXECUTORS AND GUARDIANS

2.1 Nomination of Executor. I nominate the persons listed below, one at a time and in the order indicated, as

Executor of my Will:

First: SUSAN YOUNG

Second: My sister, EUNICE SMITH

I request that no bond be required of any Executor nominated in my Will.

2.2 Guardians. If for any reason it is necessary to appoint a guardian for any of my children, then:

2.2.1. Guardian of the Person. I nominate my spouse's sister, TERESA SCOTT, to serve as the guardian of the person of such child, and if she fails to qualify or ceases to serve, I nominate my sister, EUNICE SMITH, to act as such guardian.

I desire that the care and responsibility of my minor children not create any financial or physical burden on the guardian of the person and the guardian's family. Accordingly, I authorize and encourage the guardian to request expenditure of funds or the use of my residence from the Trust established for my children under this Will as described in sections 3.3.1 and 3.3.4, respectively.

2.2.2 Guardian of the Estate. I nominate my sister, EUNICE SMITH, to serve as guardian of the estate of such child, and if she fails to qualify or ceases to serve as such guardian, I nominate my spouse's sister, TERESA SCOTT, as such guardian. No bond shall be required of any guardian nominated in this Will.

3. DISPOSITION OF PROPERTY

3.1. Confirmation of Spouse's Community Interest. I confirm to my spouse my spouse's interest in our community property.

3.2. Disposition to Spouse. I give all of my estate to my spouse if my spouse survives me, and if not then it shall be disposed of as provided in Section 3.3 below.

3.3. Disposition if Spouse Does Not Survive. If my spouse does not survive me, and all of my children who survive me have attained the age of 21, I give my estate to my issue who survive me by right of representation. If my spouse does not survive me and any child of mine who has survived me has not attained the age of 21, I give my estate, in trust, to the Trustee named below, to hold, administer, and distribute as follows:

3.3.1. Distribution of Principal and Income. The Trustee shall pay to or for the benefit of my children (or the issue of a deceased child) as much of the principal and net income of the Trust as the Trustee, in the Trustee's discretion, considers necessary for their respective health, education, support, and maintenance. Any undistributed net income shall be accumulated and added to principal.

In exercising the Trustee's discretion in making or withholding distributions, the Trustee shall take into account: (i) the value of the Trust assets and the relative current and future needs of each child (or issue of a predeceased child); (ii) the tax consequences of any distribution or failure to distribute; and (iii) any other factors that the Trustee considers relevant.

In exercising the Trustee's discretion in making or withholding distributions, the Trustee may make distributions that benefit one or more beneficiaries more than others or that completely exclude others. Any distribution shall be charged against the Trust estate as a whole and not against the ultimate distributive share of the beneficiary to whom or for whose benefit the distribution was made.

Distributions for the support and maintenance of a minor child of mine who is a beneficiary of this Trust may, in the Trustee's discretion, include payments necessary to ease the financial burden imposed on the guardian, the guardian's spouse, and the guardian's children by my child's presence in the guardian's household. For purposes of illustration, such expenses might include additional household help or the remodeling or enlarging of the guardian's residence.

3.3.2. Termination of Trust. The Trust shall terminate either when my youngest then-living child attains the age of twenty-one (21) or when I have no living issue, whichever occurs first. At termination, the Trustee shall distribute the then-remaining Trust estate to my then-living issue, by right of representation, subject to the

provisions of Section 5.1, and if there are no issue of mine then living, then as follows:

(i) One-third (1/3) to my spouse's sister, TERESA SCOTT, if she is then living and if not, to her issue who are then living by right of representation, and if none, to my spouse's parents (in equal shares if they are both then living, and if not then all to the survivor) and if neither of them is then living, then to my sister, EUNICE SMITH, if she is then living, and if not, then to her then-living issue by right of representation; and

(ii) Two-thirds (2/3) to my sister EUNICE SMITH, if she is then living, and if not, to her issue who are then living by right of representation, and if none, to my parents (in equal shares if they are both then living and if not then all to the survivor) and if neither of them is then living, then to my spouse's sister, TERESA SCOTT, if she is then living, and if not, then to her then-living issue by right of representation.

Any part of the Trust estate not distributed by the foregoing Trust provisions shall be distributed one-half (1/2) to those persons then living who (at the time of the event requiring such distribution) would then be my heirs, and one-half (1/2) to those persons then living who would then be my spouse's heirs, the identities and respective shares of the heirs of each of us to be determined as though our deaths had then occurred, and according to the laws of the State of California then in effect relating to the succession of separate property not acquired from a predeceased spouse.

3.3.3. Definition of "Education." The term "education" is meant to include vocational, professional, undergraduate, and graduate studies at an institution of the beneficiary's choice if, in the Trustee's discretion, they are pursued to advantage by the beneficiary. The Trustee may pay for the beneficiary's living and travel expenses reasonably related to the beneficiary's studies.

3.3.4. Retention of Residence. If all or a portion of my residence is held in trust, the Trustee may retain the residence in the Trust for rent-free occupancy by my children. If any of my children has a guardian of the person, the Trustee may allow the guardian and the guardian's spouse and minor children, if any, to reside, rent-free, in this residence along with my children until my youngest then-living child reaches age eighteen (18).

All costs of maintaining and repairing the residence (or, if the Trust owns a portion of it, that part of costs allocable to the Trust's interest, together with any rent or other fees paid to the owner of the other portion) shall be paid by the Trust out of either income or principal as the Trustee, in the Trustee's discretion, decides.

3.3.5. Trustee Powers. The Trustee shall have all powers conferred on trustees by California law in the absence of a limitation in this Trust instrument. These powers shall be deemed to include the power to invest in any kind of property without regard to statutory limitations, insurance, or collateralization requirements that otherwise apply, and the power to operate or participate in any business without any otherwise applicable requirement for a court order.

3.3.6. Trustee. My sister, EUNICE SMITH, shall be the initial Trustee, and if she fails to qualify or ceases to serve as Trustee, then my spouse's sister, TERESA SCOTT, shall serve as successor Trustee.

3.4 If Spouse and Children Do Not Survive. If neither my spouse nor any of my children survive me, I give my estate to my issue who survive me, by right of representation, and if neither my spouse nor any of my issue survive me, I give my estate as follows:

(i) One-third (1/3) to my spouse's sister, TERESA SCOTT, if she survives me, and if not, to her issue who survive me by right of representation, and if none, to my spouse's parents (in equal shares if they both survive me and if not then all to the survivor) and if neither of them is then living, then to my sister, EUNICE SMITH, if she survives me, and if not, then to her issue who survive me by right of representation; and

(ii) Two-thirds (2/3) to my sister EUNICE SMITH, if she survives me, and if not, to her issue who survive me by right of representation, and if none, to my parents (in equal shares if they both survive me and if not then all to the survivor) and if neither of them is then living, then to my spouse's sister, TERESA SCOTT, if she survives me, and if not, then to her issue who survive me by right of representation.

Any part of my estate not distributed by the foregoing shall be distributed one-half (1/2) to my heirs and one-half (1/2) to the heirs of my spouse, the identities and respective shares of such heirs to be determined as though our deaths had then occurred, and according to the laws of the State of California then in effect

relating to the succession of separate property not acquired from a predeceased spouse.

4. EXECUTOR'S POWERS

My Executor shall have the following powers in addition to those powers now or hereafter conferred by law:

4.1. Power to Sell or Lease Estate Property. My Executor may sell or lease, with or without notice, at either public or private sale, for cash or terms, any property of my estate that my Executor considers necessary for the estate's proper administration and distribution.

4.2. Nonprorata Distributions. When making any division or distribution of property, the Executor may, in the Executor's discretion, make the division and distribution in undivided interests, in kind, or partly in kind and partly in money, prorata or nonprorata. The Trustee may make sales of the Trust property that the Trustee considers necessary to accommodate such distributions.

5. GENERAL PROVISIONS

5.1. Minor Beneficiary. Unless otherwise specified in this Will, any distribution made by the Executor (or Trustee, for distributions to be made by the Trustee) to a minor beneficiary under this Will (including a distribution from a trust hereunder) may be made to a custodian selected by the Executor (or Trustee, for distributions to be made by the Trustee) as Custodian for the minor beneficiary until age twenty-one (21) under the California Uniform Transfers to Minors Act (Probate Code §§3900-3925). The Executor (or Trustee, for distributions to be made by the Trustee) may select herself or himself to serve as Custodian.

5.2. Powers of Independent Administration. My Executor may administer my estate under the California Independent Administration of Estates Act (Probate Code §§10400-10592).

5.3. Survivorship. For purposes of this Will, a person is deemed to survive me only if that person survives me by 30 days.

Executed on _ _[*date*]_ _, at Sacramento, California.

__[*Signature*]__
DANIEL YOUNG

On the date written below, DANIEL YOUNG declared to us that this instrument, consisting of _ _[*number*]_ _ pages, including this page, was his Will and asked us to witness it. He then signed this Will in our presence, all of us being present at the same time. At his request, in his presence, and in the presence of one another, we subscribe our names as witnesses.

We believe that Daniel Young is 18 or more years of age, is of sound mind, and is under no constraint or undue influence.

We declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on _ _[*date*]_ _, at Sacramento, California.

_ _[*Signature of witness*]_ _, _ _[*printed name of witness*]_ _, **who resides at** _ _[*address*]_ _

_ _[*Signature of witness*]_ _, _ _[*printed name of witness*]_ _, **who resides at** _ _[*address*]_ _

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Source: Estate Planning/Complete Plans for Small and Mid-Size Estates/11 Plan for Young Married Couple With Minor Children/§11.29 C. Form: Will of Susan Young

§11.29 C. Form: Will of Susan Young

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Description of document:

This form provides a suitable framework for a will that contains a testamentary trust established by a married person with children, in this case minor children. The testamentary trust will only be created if there is no surviving spouse and if any child of the testator has not yet reached the age for final distribution of assets to him or her.

WARNING: This form is a sample based on the hypothetical in this chapter only. The drafter should refer to the text of California Will Drafting (3d ed Cal CEB 1992) for detailed guidance in preparing wills. For references to provisions in specific chapters, see §11.28.

11.29-1 Form: Will of Susan Young

I, SUSAN YOUNG, a resident of Sacramento County, California, declare this is my Will. I revoke all Wills and Codicils that I have previously made.

1. FAMILY DECLARATIONS

1.1 Spouse. I am married to DANIEL YOUNG and all references to "my spouse" in this Will are to DANIEL YOUNG.

1.2 Children. I have two children, both of whom are now living, whose names and birth dates are:

JASON YOUNG	**April 4, 2004**
TIFFANY YOUNG	**April 15, 2006**

All references in this Will to "my child" or "my children" are to the children named above and any children hereafter born to or adopted by me.

I have no deceased children.

2. NOMINATION OF EXECUTORS AND GUARDIANS

2.1 Nomination of Executor. I nominate the persons listed below, one at a time and in the order indicated, as executor of my Will:

First: DANIEL YOUNG

Second: My sister, TERESA SCOTT

I request that no bond be required of any Executor nominated in my Will.

2.2 Guardians. If for any reason it is necessary to appoint a guardian for any of my children, then:

2.2.1 Guardian of the Person. I nominate my sister, TERESA SCOTT, to serve as the guardian of the person of such child, and if she fails to qualify or ceases to serve, I nominate my spouse's sister, EUNICE SMITH, to act as such guardian.

I desire that the care and responsibility of my minor children not create any financial or physical burden on the guardian of the person and the guardian's family. Accordingly, I authorize and encourage the guardian to

request expenditure of funds or the use of my residence from the Trust established for my children under this Will as described in sections 3.3.1 and 3.3.4, respectively.

2.2.2 Guardian of the Estate. I nominate my spouse's sister, EUNICE SMITH, to serve as guardian of the estate of such child, and if she fails to qualify or ceases to serve as such guardian, I nominate my sister, TERESA SCOTT, as such guardian. No bond shall be required of any guardian nominated in this Will.

3. DISPOSITION OF PROPERTY

3.1. Confirmation of Spouse's Community Interest. I confirm to my spouse my spouse's interest in our community property.

3.2. Disposition to Spouse. I give all of my estate to my spouse if my spouse survives me, and if not then it shall be disposed of as provided in Section 3.3 below.

3.3. Disposition if Spouse Does Not Survive. If my spouse does not survive me, and all of my children who survive me have attained the age of 21, I give my estate to my issue who survive me by right of representation. If my spouse does not survive me and any child of mine who has survived me has not attained the age of 21, I give my estate, in trust, to the Trustee named below, to hold, administer, and distribute as follows:

3.3.1. Distribution of Principal and Income. The Trustee shall pay to or for the benefit of my children (or the issue of a deceased child) as much of the principal and net income of the Trust as the Trustee, in the Trustee's discretion, considers necessary for their respective health, education, support, and maintenance. Any undistributed net income shall be accumulated and added to principal.

In exercising the Trustee's discretion in making or withholding distributions, the Trustee shall take into account: (i) the value of the Trust assets and the relative current and future needs of each child (or issue of a predeceased child); (ii) the tax consequences of any distribution or failure to distribute; and (iii) any other factors that the Trustee considers relevant.

In exercising the Trustee's discretion in making or withholding distributions, the Trustee may make distributions that benefit one or more beneficiaries more than others or that completely exclude others. Any distribution shall be charged against the Trust estate as a whole and not against the ultimate distributive share of the beneficiary to whom or for whose benefit the distribution was made.

Distributions for the support and maintenance of a minor child of mine who is a beneficiary of this Trust may, in the Trustee's discretion, include payments necessary to ease the financial burden imposed on the guardian, the guardian's spouse, and the guardian's children by my child's presence in the guardian's household. For purposes of illustration, such expenses might include additional household help or the remodeling or enlarging of the guardian's residence.

3.3.2. Termination of Trust. The Trust shall terminate either when my youngest then-living child attains the age of twenty-one (21) or when I have no living issue, whichever occurs first. At termination, the Trustee shall distribute the then-remaining Trust estate to my then-living issue, by right of representation, subject to the provisions of Section 5.1, and if there are no issue of mine then living, then as follows:

(i) One-third (1/3) to my sister, TERESA SCOTT, if she is then living, and if not, to her issue who are then living by right of representation, and if none, to my parents (in equal shares if they are both then living, and if not then all to the survivor) and if neither of them is still living, then to my spouse's sister, EUNICE SMITH, if she is then living, and if not, then to her then-living issue by right of representation; and

(ii) Two-thirds (2/3) to my spouse's sister EUNICE SMITH, if she is then living, and if not, to her issue who are then living by right of representation and if none to my spouse's parents (in equal shares if they are both then living and if not then all to the survivor) and if neither of them is then living, then to my sister, TERESA SCOTT, if she is then living, and if not, then to her then-living issue by right of representation.

Any part of the Trust estate not distributed by the foregoing Trust provisions shall be distributed one-half (1/2) to those persons then living who (at the time of the event requiring such distribution) would then be my heirs, and one-half (1/2) to those persons then living who would then be my spouse's heirs, the identities and respective shares of the heirs of each of us to be determined as though our deaths had then occurred, and

according to the laws of the State of California then in effect relating to the succession of separate property not acquired from a predeceased spouse.

3.3.3. Definition of "Education." The term "education" is meant to include vocational, professional, undergraduate, and graduate studies at an institution of the beneficiary's choice if, in the Trustee's discretion, they are pursued to advantage by the beneficiary. The Trustee may pay for the beneficiary's living and travel expenses reasonably related to the beneficiary's studies.

3.3.4. Retention of Residence. If all or a portion of my residence is held in trust, the Trustee may retain the residence in the Trust for rent-free occupancy by my children. If any of my children has a guardian of the person, the Trustee may allow the guardian and the guardian's spouse and minor children, if any, to reside, rent free, in this residence along with my children until my youngest then-living child reaches age eighteen (18).

All costs of maintaining and repairing the residence (or, if the Trust owns a portion of it, that part of costs allocable to the Trust's interest, together with any rent or other fees paid to the owner of the other portion) shall be paid by the Trust out of either income or principal as the Trustee, in the Trustee's discretion, decides.

3.3.5. Trustee Powers. The Trustee shall have all powers conferred on trustees by California law in the absence of a limitation in this Trust instrument. These powers shall be deemed to include the power to invest in any kind of property without regard to statutory limitations, insurance, or collateralization requirements that otherwise apply, and the power to operate or participate in any business without any otherwise applicable requirement for a court order.

3.3.6. Trustee. My spouse's sister, EUNICE SMITH, shall be the initial Trustee, and if she fails to qualify or ceases to serve as Trustee, then my sister, TERESA SCOTT, shall serve as successor Trustee.

3.4 If Spouse and Children Do Not Survive. If neither my spouse nor any of my children survive me, I give my estate to my issue who survive me, by right of representation, and if neither my spouse nor any of my issue survive me, I give my estate as follows:

(i) One-third (1/3) to my sister, TERESA SCOTT, if she survives me, and if not, to her issue who survive me by right of representation, and if none, to my parents (in equal shares if they both survive me and if not then all to the survivor) and if neither of them is then living, then to my spouse's sister, EUNICE SMITH, if she survives me, and if not, then to her issue who survive me by right of representation; and

(ii) Two-thirds (2/3) to my spouse's sister EUNICE SMITH, if she survives me, and if not, to her issue who survive me by right of representation, and if none, to my spouse's parents (in equal shares if they both survive me and if not then all to the survivor) and if neither of them is then living, then to my sister, TERESA SCOTT, if she survives me, and if not, then to her issue who survive me by right of representation.

Any part of my estate not distributed by the foregoing shall be distributed one-half (1/2) to my heirs and one-half (1/2) to the heirs of my spouse, the identities and respective shares of such heirs to be determined as though our deaths had then occurred, and according to the laws of the State of California then in effect relating to the succession of separate property not acquired from a predeceased spouse.

4. EXECUTOR'S POWERS

My Executor shall have the following powers in addition to those powers now or hereafter conferred by law:

4.1. Power to Sell or Lease Estate Property. My Executor may sell or lease, with or without notice, at either public or private sale, for cash or terms, any property of my estate that my Executor considers necessary for the estate's proper administration and distribution.

4.2. Nonprorata Distributions. When making any division or distribution of property, the Executor may, in the Executor's discretion, make the division and distribution in undivided interests, in kind, or partly in kind and partly in money, prorata or nonprorata. The Trustee may make sales of the Trust property that the Trustee considers necessary to accommodate such distributions.

5. GENERAL PROVISIONS

5.1. Minor Beneficiary. Unless otherwise specified in this Will, any distribution made by the Executor (or Trustee, for distributions to be made by the Trustee) to a minor beneficiary under this Will (including a distribution from a trust hereunder) may be made to a custodian selected by the Executor (or Trustee, for distributions to be made by the Trustee) as Custodian for the minor beneficiary until age twenty-one (21) under the California Uniform Transfers to Minors Act (Probate Code §§3900-3925). The Executor (or Trustee, for distributions to be made by the Trustee) may select herself or himself to serve as Custodian.

5.2. Powers of Independent Administration. My Executor may administer my estate under the California Independent Administration of Estates Act (Probate Code §§10400-10592).

5.3. Survivorship. For purposes of this Will, a person is deemed to survive me only if that person survives me by 30 days.

Executed on _ _[*date*]_ _, at Sacramento, California.

__[*Signature*]__
SUSAN YOUNG

On the date written below, SUSAN YOUNG declared to us that this instrument, consisting of _ _[*number*]_ _ pages, including this page, was her Will and asked us to witness it. She then signed this Will in our presence, all of us being present at the same time. At her request, in her presence, and in the presence of one another, we subscribe our names as witnesses.

We declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on _ _[*date*]_ _, at Sacramento, California.

__[*Signature of witness*]__	__[*Signature of witness*]__
_ _[*Typed name*]_ _	_ _[*Typed name*]_ _
_ _[*Address*]_ _	_ _[*Address*]_ _

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Source: Estate Planning/Complete Plans for Small and Mid-Size Estates/11 Plan for Young Married Couple With Minor Children/§11.30 D. Form: Financial Uniform Statutory Form Power of Attorney

§11.30 D. Form: Financial Uniform Statutory Form Power of Attorney

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Description of document:

This financial uniform statutory form power of attorney also provides for personal and family maintenance powers (see §11.19) and conservator nomination (see §11.20). The form shown below is Dan's version; Sue's version would be identical, except in the details noted in the Comment following the form.

WARNING: This form is a sample based on the hypothetical in this chapter. The drafter should refer to the text of California Powers of Attorney and Health Care Directives (Cal CEB 2008) before preparing a durable power of attorney. For financial management and personal care issues and forms, see Powers of Attorney, chaps 4-6; for nomination of conservator, see Powers of Attorney §§5.44-5.45.

11.30-1 Financial uniform statutory form power of attorney

FINANCIAL UNIFORM STATUTORY FORM POWER OF ATTORNEY

(California Probate Code Section 4401)

NOTICE: THE POWERS GRANTED BY THIS DOCUMENT ARE BROAD AND SWEEPING. THEY ARE EXPLAINED IN THE UNIFORM STATUTORY FORM POWER OF ATTORNEY ACT (CALIFORNIA PROBATE CODE SECTIONS 4400-4465). IF YOU HAVE ANY QUESTIONS ABOUT THESE POWERS, OBTAIN COMPETENT LEGAL ADVICE. THIS DOCUMENT DOES NOT AUTHORIZE ANYONE TO MAKE MEDICAL AND OTHER HEALTH-CARE DECISIONS FOR YOU. YOU MAY REVOKE THIS POWER OF ATTORNEY IF YOU LATER WISH TO DO SO.

I, DANIEL YOUNG, also known as Daniel P. Young, 123 Main Street, Sacramento, California 95825, appoint my spouse, SUSAN YOUNG, 123 Main Street, Sacramento, California 95825, as my Agent (attorney-in-fact) to act for me in any lawful way with respect to the following initialed subjects.

TO GRANT ALL OF THE FOLLOWING POWERS, INITIAL THE LINE IN FRONT OF (N) AND IGNORE THE LINES IN FRONT OF THE OTHER POWERS.

TO GRANT ONE OR MORE, BUT FEWER THAN ALL, OF THE FOLLOWING POWERS, INITIAL THE LINE IN FRONT OF EACH POWER YOU ARE GRANTING.

TO WITHHOLD A POWER, DO NOT INITIAL THE LINE IN FRONT OF IT. YOU MAY, BUT NEED NOT, CROSS OUT EACH POWER WITHHELD.

INITIAL

____ (A) Real property transactions.

____ (B) Tangible personal property transactions.

____ (C) Stock and bond transactions.

____ (D) Commodity and option transactions.

____ (E) Banking and other financial institution transactions.

____ (F) Business operating transactions.

____ (G) **Insurance and annuity transactions.**

____ (H) **Estate, trust, and other beneficiary transactions.**

____ (I) **Claims and litigation.**

____ (J) **Personal and family maintenance.**

____ (K) **Benefits from Social Security, Medicare, Medicaid, or other governmental programs, or civil or military service.**

____ (L) **Retirement plan transactions.**

____ (M) **Tax matters.**

DY (N) **ALL OF THE POWERS LISTED ABOVE.**

YOU NEED NOT INITIAL ANY OTHER LINES IF YOU INITIAL LINE (N).

SPECIAL INSTRUCTIONS

ON THE FOLLOWING LINES YOU MAY GIVE SPECIAL INSTRUCTIONS LIMITING OR EXTENDING THE POWERS GRANTED TO YOUR AGENT.

The Principal gives his Agent (attorney-in-fact) the following additional powers and instructions:

1. For purposes of determining incapacity under this instrument, incapacity shall be determined by the written certification of two licensed physicians that the principal or agent is physically or mentally unable to handle his or her financial affairs, whether or not a court of competent jurisdiction has declared such person incapacitated, mentally ill, or in need of a conservator;

2. Should SUSAN YOUNG be unable or unwilling to act as my Agent (attorney-in-fact) hereunder, I appoint my sister, EUNICE SMITH, who currently resides at 456 Oak Drive, Sacramento, California, as Agent (attorney-in-fact); and should EUNICE SMITH be unable or unwilling to act as my Agent (attorney-in-fact) hereunder, I appoint my spouse's sister, TERESA SCOTT, who currently resides at 789 Cedar Street, Sacramento, California, as my Agent (attorney-in-fact), provided, however, that neither EUNICE SMITH nor TERESA SCOTT shall have any powers hereunder until I am incapacitated.

3. My Agent (attorney-in-fact) is authorized to do all things and enter into all transactions necessary to provide for my personal care, and to maintain my customary standard of living, and to coordinate with my agent under a health care power of attorney as necessary. The above shall specifically include, but not be limited to, the authority to:

(1) Determine where I live and make necessary arrangements, including entering into contracts on behalf of the principal with residential facilities, hospitals, hospices, nursing homes, convalescent homes, and similar organizations;

(2) Provide for my meals and snacks, or arrange to have someone else provide them;

(3) Screen, choose, hire, and discharge household, nursing, and other employees as the Agent considers advisable for my well-being;

(4) Provide for transportation, recreation, travel, and entertainment for me;

(5) Handle my mail;

(6) Choose, purchase, and maintain my clothing;

(7) Provide my medicine, personal care products and items, such as toothpaste and shampoo, and provide for my personal care and hygiene needs, such as bathing and hair care;

(8) Arrange for my spiritual and religious needs to be met;

(9) Purchase, maintain, and repair my household contents, disposing of items that cannot be properly cleaned or repaired, and storing or selling items no longer needed or used by me;

4. If it becomes necessary to appoint a conservator of my person, I nominate the following individual to act as such conservator: my spouse, SUSAN YOUNG, and if she is unable or unwilling to act, I nominate my sister, EUNICE SMITH, and if she is unable or unwilling to act, I nominate my spouse's sister, TERESA SCOTT.

5. If it becomes necessary to appoint a conservator of my estate, I nominate the following individual to act as such conservator: my spouse, SUSAN YOUNG, and if she is unable or unwilling to act, I nominate my sister, EUNICE SMITH, and if she is unable or unwilling to act, I nominate my spouse's sister, TERESA SCOTT.

UNLESS YOU DIRECT OTHERWISE ABOVE, THIS POWER OF ATTORNEY IS EFFECTIVE IMMEDIATELY AND WILL CONTINUE UNTIL IT IS REVOKED.

This power of attorney will continue to be effective even though I become incapacitated.

STRIKE THE PRECEDING SENTENCE IF YOU DO NOT WANT THIS POWER OF ATTORNEY TO CONTINUE IF YOU BECOME INCAPACITATED.

EXERCISE OF POWER OF ATTORNEY WHERE MORE THAN ONE AGENT DESIGNATED

If I have designated more than one agent, the agents are to act *NOT APPLICABLE* .

_____
Initial

IF YOU APPOINTED MORE THAN ONE AGENT AND YOU WANT EACH AGENT TO BE ABLE TO ACT ALONE WITHOUT THE OTHER AGENT JOINING, WRITE THE WORD "SEPARATELY" IN THE BLANK SPACE ABOVE. IF YOU DO NOT INSERT ANY WORD IN THE BLANK SPACE, OR IF YOU INSERT THE WORD "JOINTLY" THEN ALL OF YOUR AGENTS MUST ACT OR SIGN TOGETHER.

I agree that any third party who receives a copy of this document may act under it. A third party may seek identification. Revocation of the power of attorney is not effective as to a third party until the third party has actual knowledge of the revocation. I agree to indemnify the third party for any claims that arise against the third party because of reliance on this power of attorney.

Signed on _ _[*date*]_ _, at _ _[*city*]_ _, California.

__[*Signature*]__
DANIEL YOUNG

BY ACCEPTING OR ACTING UNDER THE APPOINTMENT, THE AGENT ASSUMES THE FIDUCIARY AND OTHER LEGAL RESPONSIBILITIES OF AN AGENT.

CERTIFICATE OF ACKNOWLEDGMENT OF NOTARY PUBLIC

[*See §9.38 for form of Acknowledgment*]

Comment: Sue's power of attorney will be identical to Dan's except in particular details. Aside from the nominations in paragraphs 2, 4, and 5, it will include the same Special Instructions as Dan's form. In contrast to Dan's form, Sue's will:

- Name her husband, Daniel Young, as her Agent, with Eunice Smith as the first alternate and Teresa Scott as the second alternate;

- Nominate Daniel Young as conservator of her person, with Teresa as the first alternate and Eunice as the second alternate; and
- Nominate Daniel Young as conservator of her estate, with Eunice her first alternate and Teresa her second alternate.

Some practitioners provide the principal, and in some cases the agent, with copies of the Probate Code sections that describe the powers identified with the terms used in the uniform durable power of attorney form. See Prob C §§4400-4465.

Although it is sufficient to have the client initial only the desired items, some practitioners think it prudent also to strike out portions not wanted.

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§11.31 E. Advance Health Care Directive

Pages i-iv of the CMA Advance Health Care Directive form contain a very clear and concise summary of the directive and its function. Dan and Sue will each fill out a form. On page 1 of the form, item 1, each will check Option A and print his or her full name (Daniel Young, Susan Young). Although the form asks for the principal's date of birth, it is not required. On page 2, in his form Dan will appoint Sue and on her form Sue will appoint Dan as the agent; each will fill in the requested contact information. Under "OPTIONAL," Dan will name his sister, Eunice Smith, as his alternate agent in his form and Sue, in her form, will name her sister, Teresa Scott, as her agent. Each will fill in the contact information for the alternate. Nothing needs to be filled in on page 3.

NOTE: Item 2 on page 3 has an OPTIONAL provision that gives the agent immediate authority to make health care decisions for the principal, even though the principal is still able to make them personally. Neither Dan nor Sue wants to sign this statement. See §9.36 for circumstances in which a person might want the health care power of attorney to be effective immediately.

On page 4, as discussed in the interview, Dan on his form and Sue on hers will sign OPTIONAL statement 5.A. Neither will fill in the other OPTIONAL sections of item 5.

On page 5, because neither Dan nor Sue wants to be an organ or tissue donor, they should draw a line through item 6 (Organ and Tissue Donation) and initial the strike-through.

When Dan and Sue bring their forms to the final appointment with their attorney, the attorney should review them to make sure that the forms have been filled out correctly. Each can then sign in front of two witnesses in the attorney's office when they sign their other estate planning documents.

The CMA Advance Health Care Directive kit may be purchased by calling 800-882-1262; by sending a fax to 415-882-5195; by ordering online from the CMA Bookstore at http://www.cmanet.org/bookstore; or by mailing the request, with payment, to CMA Publications, 1201 J Street, Suite 200, Sacramento, CA 95814-2906.

NOTE: Although Dan and Sue's attorney prefers to use the California Medical Association AHCD form, other attorneys prefer to use their own attorney-drafted AHCD form tailored to the clients' concerns. See §§10.24, 10.36.

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Source: Estate Planning/Complete Plans for Small and Mid-Size Estates/11 Plan for Young Married Couple With Minor Children/§11.32 F. Form: Transmittal Letter to Client

§11.32 F. Form: Transmittal Letter to Client

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Description of document:

The draft documents should be prepared and sent to Dan and Sue along with a transmittal letter. The documents should be mailed to them so that they have enough time to carefully review them before their final appointment with the attorney. Questions should be answered and changes made before the documents are executed at the appointment.

WARNING: This form is a sample based on the hypothetical in this chapter. The transmittal letter should be tailored to the documents drafted and to the clients' concerns, pointing out any unusual provisions. It should include any warnings that the attorney wants to emphasize.

11.32-1 Transmittal letter to client

[*Attorney's letterhead*]

_ _[*Date*]_ _

Daniel and Susan Young
123 Main Street
Sacramento, California 95825

Dear Dan and Sue:

It was a pleasure meeting with you last week to discuss your estate planning. Enclosed for your review are *drafts* of the following documents to put in place the estate plan we spoke about:

<u>For Dan</u>

1. Will

2. Durable Power of Attorney for property management

3. Advance Health Care Directive

<u>For Sue</u>

1. Will

2. Durable Power of Attorney for property management

3. Advance Health Care Directive

In addition, I am enclosing a draft of the deed (and related Preliminary Change of Ownership form) to change the ownership of your home from joint tenancy to community property with right of survivorship.

These enclosed drafts are based on the information you provided to me in the estate planning questionnaire and in our discussions about your current (and anticipated) situation*. If there are significant changes to your assets or liabilities or to your family situation in the future, these documents may no longer be appropriate and you should consult with me or another estate planning attorney to see whether changes are in order.* This is particularly true with respect to estate taxes because the tax laws are constantly in flux. In any event, it is a good idea to review your estate plan every 5 years or so, to make sure it still operates as you wish.

The discussion below summarizes the important aspects of your estate plan. Please review the enclosed drafts and this letter to make sure everything is correct. If so, please call me to arrange a convenient time for you to come to the office so that I can supervise the execution of the documents. If any changes are required, please let me know so that I can make them before you execute the documents.

Care of Your Minor Children

One major concern of yours was the care of Jason and/or Tiffany should you both die before Tiffany (or any later-born child of your marriage to one another) reaches age 18. You have decided to have Susan's sister, Teresa Scott, be responsible for the day-to-day care and custody of a minor child and to have Dan's sister, Eunice Smith, be responsible for managing the child's inheritance. These decisions are included in your Wills under the provisions for "guardian of the person" and "guardian of the estate."

Distribution of Your Assets at Death

At the first death, all of your assets will be given to your spouse if he or she has survived you and, at the second death, the assets will be given to your children.

Remember, this means that if you die first, your spouse is free to do what he or she pleases with the assets inherited from you: The surviving spouse can leave the assets to people or organizations other than your children.

If you are the second to die, your assets will be distributed to your children. The assumption is that you will live a long and good life and that the death of the second of you will take place when Jason and Tiffany (and any other children born of your marriage to one another) are adults. In this event, your assets will be distributed to your children in equal shares (if a child has died before you and left children, that child's share would be distributed to that child's children).

However, in the event you both die while Jason and Tiffany are young (before Tiffany or any later-born child attains age 21), your assets (other than your IRAs; see separate discussion below) will be held in a trust for the benefit of all of your children so that the trustee (first Eunice, then Teresa) can manage the assets for them. As we discussed, keeping the assets in a pooled trust (the "pot trust") will allow the funds to be used for the education of your children before it is distributed to them (so that a younger child is not disadvantaged by having to spend his or her inheritance on education, in contrast to an older child who may not need to use the funds for that purpose).

We discussed the fact that the desired distribution of your assets at death could be achieved using either a Will or a revocable trust. You decided that, at this point in your lives, Wills would be sufficient, but you will consider this issue again in the future.

Thus, your Wills govern the distribution of most of your assets, with the following notable exceptions:

(i) Residence: At the death of the first of you to die, title to your residence, which was acquired and is being maintained with community property, will pass automatically to the survivor of you because title will be changed to "community property with right of survivorship." As we discussed, this will not only enable your spouse to receive the house easily at the first death but will also allow for favorable income tax treatment if the house appreciates in value between now and the death of the first of you. (Although title passes automatically as a matter of law, at the death of the first of you, the survivor will still need to record an affidavit with the County Recorder to document the death.) At the second death, the assets will pass to your children under the Will of the survivor (assuming no change has been made to the Will following the death of the first of you).

(ii) Life Insurance: Life insurance proceeds are not governed by your Wills. The life insurance proceeds are payable to the individual(s) you designate as beneficiaries on the contract you have with the insurance company.

I suggested that you increase the amount of life insurance on Dan's life and obtain life insurance on Susan's life, and you will be following up on this.

The primary beneficiary of each policy should be your spouse. I recommend that the contingent beneficiary (if your spouse does not survive you) should be as follows (note, however, that this beneficiary designation

will need to be updated if you have additional children or if Jason or Tiffany predeceases the insured):

"Jason Young and Tiffany Young in equal shares; provided that if Tiffany Young is not yet age 21, the person named as Trustee under my Will of the Trust for the benefit of Jason Young and Tiffany Young."

Because the life insurance proceeds are expected to be a significant amount, they should be held in trust for your children; and, if a child dies before both of you die and leaves surviving children, the proceeds would be held in trust for them as well until the youngest of your children reaches age 21.

(iii) IRAs. The assets in your IRA accounts are similarly not governed by your Wills, but rather by the designated beneficiary you name on the IRA custodian's designation form. The primary beneficiary of your IRA should be your spouse. I recommend that the contingent beneficiary (if your spouse does not survive you) should be as follows (note, however, that this beneficiary designation will need to be updated if you have additional children or if Jason or Tiffany or Eunice predeceases the IRA owner):

Jason Young and Tiffany Young in equal shares; provided that if Jason Young or Tiffany Young is not yet age 21, then to Eunice Smith as Custodian for such child under the California Uniform Transfers to Minors Act until age 21.

Because the assets in your IRA accounts are relatively modest and naming a trust as an IRA beneficiary may create complications, the language above is a way of providing for the IRA account to pass to your children so that it will be managed for each child until he or she is age 21, but also avoids the creation of a guardianship.

Management of Assets During Lifetime

The enclosed Durable Power of Attorney allows your spouse to handle legal and financial affairs for you; it is effective immediately and continues through any period of your incapacity. If your spouse is unwilling or unable to serve as your agent under the power of attorney, you both name Dan's sister, Eunice, as your agent, with Susan's sister, Teresa, as agent if Eunice cannot serve. In this event, however, Eunice's (or Teresa's) authority will commence only if you become incapacitated.

The agent is given broad powers, including the ability to make such personal care decisions as where you will live. As we discussed, it is critical that you trust the people you are naming as agents, because this gives the agent access to all of your assets not in your trust if you become incapacitated.

Please review these provisions carefully to make sure they meet with your approval.

Health Care Decisions

The enclosed Advance Health Care Directive allows someone to make health care decisions for you if you are unable to make them for yourself, and also provides guidance to your agent about your health care choices. You each name your spouse as your agent to make health care decisions for you and, if your spouse is not willing or able, you each name your sister and then your spouse's sister as your health care agent.

Conclusion

I know the enclosed documents and our discussions include a lot of information. If you have any questions, please let me know.

If you have no questions, please call after you have finished your review of the enclosed drafts so that I can put them in final form and we can meet to have them executed.

Very truly yours,

__[*Signature of attorney*]__
_ _[*Typed name*]_ _

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11A

Plan for Married Couple With Adult Children

Sandra Price

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§11A.1 I. INTRODUCTION

As noted in earlier chapters, the initial meeting with clients involves a great deal of fact and information gathering. For a detailed discussion of these issues, see §§9.1-9.3. For a sample questionnaire to obtain such information that can be sent to the client in advance of the first meeting or used by the attorney at that meeting, see chap 8.

Any time an attorney represents a married couple, at the first interview the attorney must discuss potential conflicts of interest with the clients and obtain a written waiver. For a thorough discussion of conflicts waivers and sample forms, see chap 2.

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II. PLANNING FOR COUPLE WITH ADULT CHILDREN

A. The Hypothetical Clients

§11A.2 1. The Family

Harold Older is 64 years old and is married to Wendy Older who is 54 years old. Harold works in middle management but expects to retire soon; he has been with the same company for the past 25 years. Wendy worked as a teacher before marriage but after the birth of her first child she stopped working outside the home to stay at home to raise the children. Wendy resumed working as a teacher about 7 years ago, when the youngest child went off to college. She enjoys teaching and plans to continue working for at least another 6 years.

Harold and Wendy have been married for 35 years. Neither was previously married. Harold and Wendy have four children: Aaron, Beatrice, Catherine, and David, respectively aged 26, 30, 33 and 35; all four children have finished college and are working:

Aaron is 26, single, and has an active social life. He has no children. Harold and Wendy initially describe him as improvident and not good with money. Later in the interview, however, they disclose their concern that he may have a serious drug problem and they note that they have already had to provide him with financial assistance in the form of loans.

Beatrice is 30 years old. She is a divorced mother with two children, Elizabeth, who is 5, and Francine, who is 7. Her former husband is financially irresponsible and is usually late paying the small amount of child support ordered by the court. In some months, he pays nothing. Beatrice is very responsible financially but she is in a low-paying job. Elizabeth has learning disabilities and needs a tutor. Harold and Wendy have already provided financial assistance to Beatrice for Elizabeth's special education needs in the form of loans.

Catherine is 33 years old. She has a good job and is on a good career path. She is married to Steven Smith, a very wealthy man. Catherine plans to continue working and also plans on having children. Harold and Wendy do not like Catherine's husband and worry that the marriage will not last.

David is 35 years old. He is a single gay man and currently not in a committed relationship. David legally adopted George, who is now 5, several years ago and has sole legal custody of the child. David is a high school teacher. He would like to go back to school to obtain a doctorate, with the thought of becoming a college professor. Harold and Wendy treat George no differently than their naturally born grandchildren.

Harold's parents are both deceased. He inherited about $25,000 from them. Harold did not keep this inheritance segregated from the other assets he and Wendy own and it was either spent long ago or is now an unidentifiable part of one of their investments.

Wendy's parents are both living. Although elderly, they are in good health and will likely spend virtually all of their assets in retirement. At this time, therefore, Wendy does not expect a significant inheritance.

Harold and Wendy each have two sisters.

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Source: Estate Planning/Complete Plans for Small and Mid-Size Estates/11A Plan for Married Couple With Adult Children/§11A.3 2. The Assets

§11A.3 2. The Assets

All of the assets now owned by Harold and Wendy (other than Harold's $25,000 inheritance) were acquired after they were married and would therefore be community property. Because of the commingling, Harold and Wendy agree that the inheritance should be considered community property.

The following is a list of the assets of Harold and Wendy as of November 2008:

Title	Date Acquired and Basis	Debt	Description of Asset/Interest	Current Value
Harold Older and Wendy Older, Husband and Wife, as joint tenants	Purchased in 1982 for $85,000	$300,000 (refinanced several times)	Residence located at 123 Main St., Sacramento, California	$ 700,000
Harold Older and Wendy Older, joint tenants			Certificates of deposit	25,000
Harold Older and Wendy Older, joint tenants			Credit union checking account (interest bearing)	10,000
Harold Older and Wendy Older, joint tenants	Various acquisition dates, mostly recent (they are active traders)		Brokerage account with stocks, bonds, mutual funds	135,000
Harold Older and Wendy Older, as community property			Interest in XYZ Corp (good friend's closely held company -a startup)	20,000
Harold Older; Wendy is beneficiary			401(k), pension and profit sharing plans	410,000
Wendy Older; Harold is beneficiary			Retirement plan through work	40,000
Harold Older; Wendy is beneficiary			IRA	40,000
Wendy Older; Harold is beneficiary			IRA	15,000
Harold Older			2004 Volvo	15,000
Wendy Older			2000 Toyota	5,000
None			Furniture, furnishings, and personal effects	20,000

Harold Older, insured; Wendy is beneficiary	Term life insurance policy owned by Harold	500,000
Wendy Older, insured; Harold is beneficiary	Life insurance benefit through work	50,000
TOTAL		$1,985,000

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§11A.4 B. Determining Client' s Goals and How to Achieve Them

In addition to obtaining the information about Harold and Wendy and their assets and family, the attorney should discuss their objectives. As with most married couples, Harold and Wendy want to provide for the survivor of them and ensure that their children will receive assets not needed by the surviving spouse. They are also considering whether they want to make some gifts to their children at the first death. In addition, because Harold and Wendy have grandchildren with whom they are close, the attorney should inquire about Harold's and Wendy's thoughts about leaving any assets to them. In any event, the attorney should confirm that there are no other goals, unusual family circumstances, or other issues that would affect the estate plan. Once the attorney has gathered information, the attorney can discuss with the clients how best to achieve their goals. The balance of this chapter discusses the formulation of the plan that will achieve the goals of Harold and Wendy.

The attorney may wish to discuss with Harold and Wendy the pros and cons of talking with some or all of their children during this planning and formulation stage. It is often useful to solicit the wishes of the intended beneficiaries. For example, a wealthy child may say, "I'm fine; don't leave me anything; leave it to my children." A child whom the parents were planning to name as executor may say, "Don't put me in charge; I don't want to be fighting with my siblings." Parents often feel uncomfortable doing this sort of collaborative planning. Often family dynamics make it difficult to talk about financial matters or death. Often the parents may feel they want the flexibility—without further communication with their children—of changing their estate plan should circumstances change.

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§11A.5 C. No Guardianship for Minors

There is no need for Harold and Wendy to consider guardians of the person and estate of their children, who are all adults. Any nominations for guardians of the person and estate of minor grandchildren would be included in the child's estate plan (*i.e.,* the parent of the grandchild), not in the estate plan of Wendy and Harold. However, to the extent that Wendy and Harold are planning on leaving assets to their grandchildren, the attorney should discuss the alternative methods of leaving assets to minors.

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D. Formulating the Estate Plan for Asset Management and Distribution

1. Beneficiaries; Choice of Documents

§11A.6 a. Spouse

With the exception of small gifts to their grandchildren, Harold and Wendy want to leave all of their assets to the survivor of them at the first death. The attorney should make sure that Harold and Wendy understand that the survivor will control all of the couple's assets left to the survivor, both during the survivor's lifetime and at the survivor's death. That is, the survivor can spend the assets, or give them away during lifetime, or bequeath them to anyone at death and there is no guarantee that the children (or grandchildren) will receive the assets. Because this is a long-term marriage, based on a lifetime of trust, this may not be an issue. On the other hand, some clients are concerned that an aging spouse could become the victim of fraud or otherwise unwittingly deplete the assets or could remarry and intentionally or inadvertently leave assets to the new spouse.

If either spouse is concerned about the other spouse surviving and taking action that would cause assets to be diverted away from the children and grandchildren, then the attorney should discuss methods that will address these concerns, such as a bypass trust. See chap 3.

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§11A.7 (1) Estate Tax Considerations; Disclaimer

Harold and Wendy have stated that they want to leave everything to the survivor. Doing so means that there will be no estate tax liability at the first death because of the unlimited estate tax marital deduction. See chap 3. The attorney should explain, however, that at the death of the surviving spouse, all of the assets the surviving spouse inherited from his or her predeceased spouse, along with the surviving spouse's own assets, will be subject to estate tax. If both die in 2008 or 2009, there would be no estate tax issue because they can each have an estate of $2 million in 2008 and $3.5 million in 2009 without triggering an estate tax. Their combined estates presently do not reach these thresholds. However, there is uncertainty about what the estate tax laws will be in following years. In addition, asset values may change either dramatically (for example, if the startup company goes public) or simply by anticipated appreciation over a long time frame. Finally, their assets may increase significantly depending on how many more years Harold and Wendy continue working and accruing benefits. For these reasons, it is a good idea for Harold and Wendy to think flexibly.

Putting some or all of the assets of the first spouse to die in a properly structured bypass trust for the benefit of the surviving spouse will keep the assets out of the taxable estate of the surviving spouse. However, requiring this may turn out to be unnecessary from a tax perspective, as well as unnecessarily burdensome from an administrative perspective.

One way of giving the assets of the predeceased spouse to the surviving spouse and still allowing the surviving spouse to decide whether tax planning is necessary based on circumstances as they exist at the time of the first spouse's death is through use of a disclaimer trust. See chap 3. The disclaimer trust will include the terms for a bypass trust but the disclaimer trust will only be funded and come into existence if the surviving spouse elects to implement it within 9 months of the first spouse's death. The disclaimer trust, if created, will be a separate tax-paying entity.

For further discussion, see §§3.41-3.44.

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§11A.8 (2) Life Insurance Needs

Assuming that the annual premiums for the life insurance policy are not unreasonable, keeping Harold's insurance policy in place will provide a nice cushion for Wendy if Harold dies first. Wendy, therefore, should be named as the primary beneficiary, and Harold should be sure he names an alternate beneficiary in the event that Wendy does not survive him. The attorney should explain that the tax considerations that arise with retirement plans and IRAs (see §11A.9) do not apply to life insurance proceeds.

NOTE: Whether to change the ownership of the policy from Harold to Wendy, or to an insurance trust, is beyond the scope of this discussion. See California Estate Planning, chap 19 (Cal CEB 2002).

It appears that if Wendy were to predecease him, Harold would have sufficient assets and sources of income for his retirement. If Wendy dies while still working as a teacher, her life insurance benefit through work would provide a small amount for Harold. She should continue to name him as the primary beneficiary and should be sure to name an alternate in the event that Harold does not survive her and she is still employed at the time of her death. If Harold feels he needs additional security, he and Wendy can explore obtaining life insurance on Wendy's life.

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§11A.9 (3) Retirement Assets

Harold and Wendy have named each other as beneficiaries of their retirement plans and IRAs. The attorney should discuss with them the issue of the contingent beneficiary (*i.e.,* the beneficiary if the spouse does not survive). Naming the children as plan beneficiaries if the spouse does not survive means that the adjustments Harold and Wendy wish to include in their estate plan (see §11A.19) will not apply to the retirement benefits and may result in a skewing of the overall estate plan. This potential problem is especially a concern because these work-related assets comprise a significant part of Harold and Wendy's assets.

If Harold and Wendy decide to use a revocable trust, one logical approach would be to name the trust as the contingent beneficiary. The retirement plan and IRA proceeds would be paid to the trustee, who would then distribute them from the trust along with all of Harold and Wendy's other assets according to the terms of the trust.

There are significant income tax consequences, however, to the recipient of retirement benefits (with the exception of Roth IRAs). The benefits are generally taxable as ordinary income to the recipient when received, although a surviving spouse has a special deferral opportunity by using a spousal "rollover." See §§6.20-6.25. If the children are designated the contingent beneficiaries, each will have the option of taking a lump sum payment (with the income tax due in the year the payment is received), taking the distribution over a 5-year period, or receiving the payments spread out over his or her lifetime (referred to as taking advantage of a "stretch out"), with the income tax payable for the year in which the payment(s) is (are) received. However, unless certain requirements are satisfied (see §6.21), the stretch out option might not be available to Harold and Wendy's children if the trust is named the contingent beneficiary.

PRACTICE TIP: If Harold and Wendy name the trust as the contingent beneficiary, if the attorney is not expert in this area, a tax professional knowledgeable in retirement benefit distributions should be consulted to make sure that the revocable trust is drafted properly to maximize the options available to the children.

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§11A.10 b. Children

There are a number of issues that Harold and Wendy should consider in determining how and when their children should receive their inheritances. If they decide that at the second death the assets are to be distributed in equal shares to the 4 children, they still must address the following issues:

- Consequence of loans: At present, Aaron and Beatrice have received loans from Harold and Wendy. In the future, it is possible that Beatrice may need additional financial help from her parents. Harold and Wendy, out of their sense of what is fair, want the loans that they have made and that they may make in the future to "count" towards each child's inheritance. Essentially the loans are to be considered advances on their inheritances so that each child receives the same cumulative total amount. Harold and Wendy should also consider whether only the principal will be treated as an advancement in order to achieve "rough justice," or whether principal and interest (and at what rate) will be considered an advancement.
- Leaving gifts outright or in trust: While the simplest plan would be to leave each child's inheritance to him or her outright, Harold and Wendy recognize that there may be some disadvantages to this approach. They must understand that once left outright, the child is free to do what he or she wants with the inheritance, including leaving it to a spouse or partner rather than to grandchildren, spending it imprudently (and in particular in Aaron's case, spending it harmfully). Further, once received, the inheritance becomes available to creditors. Placing assets in trust could address most of these concerns. However, trusts have their own disadvantages, particularly fees and ongoing administrative duties for the trustee.

The attorney should explain to Harold and Wendy that even if each child is allocated an equal share, distribution can be tailored differently for each child depending on his or her circumstances. They therefore should consider each child's situation separately.

PRACTICE TIP: Treating the children differently may be a reason for the collaborative planning discussed in §11A.4, so that each beneficiary understands the reasons for the differences and so that there are no hard feelings among the children.

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§11A.11 (1) Aaron

Aaron's situation is particularly worrisome to Harold and Wendy because of his drug problems and because there are no easy answers. If they leave him an inheritance outright, he might spend it very quickly or spend it on enough drugs to endanger himself. They believe it would be best to leave his inheritance in trust, controlled by someone else. However, this raises the additional issue of who to name as trustee. His inheritance is not likely to be large enough for a corporate fiduciary to be willing to serve as trustee. A sibling seems like a bad idea in part because of family dynamics and in part because none of Aaron's siblings will have the time or expertise to devote to serving as trustee in a difficult situation over a potentially long period of time. A private professional fiduciary, who would be an independent, licensed individual (Bus & P C §6530), may be a good choice.

PRACTICE TIP: A list of private professional fiduciaries in California is available from the statewide organization, Professional Fiduciary Association of California (PFAC) (www.pfac-pro.org). The website for the Professional Fiduciaries Bureau of the California Department of Consumer Affairs can be consulted to determine whether a professional fiduciary is licensed. See http://www.fiduciary.ca.gov/.

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§11A.12 (2) Beatrice

Harold and Wendy see no problem leaving Beatrice her inheritance outright. She is financially responsible. They are not concerned about Beatrice leaving her inheritance to a spouse if she remarries because they expect that she will need the inheritance during her lifetime for her own and her children's support. Harold and Wendy also assume that Beatrice will make appropriate arrangements for her children in her own estate plan.

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§11A.13 (3) Catherine

Because Catherine is financially responsible, Harold and Wendy have no concerns about leaving her inheritance to her outright and free of trust. However, they do have some qualms that if Catherine leaves her assets to her spouse, as might be expected if she does not have children, her husband could wind up with a part of Harold and Wendy's assets to the detriment of Aaron, Beatrice, and David. Placing assets in trust for Catherine would resolve this problem but seems burdensome under the circumstances.

Harold and Wendy decided to discuss with Catherine their concerns. Catherine informs them that she feels very comfortable financially both because of her marriage and her career. She requests that her share of any inheritance be given to her children, if any, and if she has no children, that what would have been her inheritance be shared by her siblings. Further, Catherine tells Harold and Wendy that, with regard to any gift to her children, she would like the gift to be given free of trust but with some management control imposed until a child attains age twenty-one (21)). She requests that she be named the custodian. Although she would prefer that Steven, her husband, be named the successor, she agrees with her parents wish that her brother David be named the successor.

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§11A.14 (4) David

Harold and Wendy have accepted that David is gay and have accepted George as their grandchild. They have no concerns about David's ability to manage any inheritance and so see no problem leaving his share of their estates to him outright. They recognize that David may have a partner (whether married to him or not) and that David's inheritance could be left to that person. As with Beatrice, they assume that David will arrange his own financial affairs to protect George.

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§11A.15 c. Grandchildren

Harold and Wendy believe that their children, with the possible exception of Catherine, may need the assets they leave them in order to enjoy a comfortable lifestyle and retirement. They therefore do not want to make major bequests to their grandchildren. However, Harold and Wendy feel strongly that they would like to leave each grandchild an amount to remember them by. The attorney should ask Harold and Wendy to decide on an amount and how they want to treat any later-born grandchildren and whether they want any of their children's adopted, step, or foster children to be considered grandchildren for purposes of any gifts.

Harold and Wendy have been making gifts to California Uniform Transfers to Minors Act (CUTMA) (Prob C §§3900-3925) accounts for their grandchildren for the past several years in order to assist with building up a college fund for each. They want the survivor of them to be able to continue making such gifts to grandchildren but they do not wish to require it because the survivor may need these funds or the survivor may determine that gifts to the child who is the parent of the grandchild may be more appropriate at any given time.

The attorney should instruct Harold and Wendy to review all existing CUTMA accounts and make sure that they name a successor custodian on each account. The attorney should also remind them to name a custodian and successor custodian on future accounts that they may open.

PRACTICE TIP: It is important that a successor custodian is named on each CUTMA account because if one is not named, it may be necessary to obtain a court order appointing a successor. See Prob C §3918(d).

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§11A.16 d. Other Beneficiaries

Given the fact that Harold and Wendy have children and grandchildren now living, it is difficult for them to imagine that at least one of their descendants will not survive them to inherit their assets. However, this possibility should be explored so that an ultimate contingent beneficiary clause can be included in their estate planning documents. Harold and Wendy should discuss other possible beneficiaries such as their siblings, their surviving parents, or charities.

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e. Decisions and Implementation of Plan

§11A.17 (1) Revocable Trust With Disclaimer Trust and Pourover Wills

To implement their plan, Harold and Wendy decide to have the attorney draft a joint revocable trust and pourover wills.

Any assets owned by the trustee of the revocable trust will not be subject to probate at the death of Harold or Wendy, so it is important to transfer title of each asset that will be part of the trust to the trustee(s) of the revocable trust as soon as possible after the trust is created.

Under the terms of the revocable trust, the survivor will have the ability to disclaim some assets, with the disclaimed assets passing to a Disclaimer Trust. The assets of the Disclaimer Trust will not be subject to estate taxation at the survivor's subsequent death. The amount to disclaim will not be stated in the revocable trust, allowing the surviving spouse to disclaim whatever amount will be appropriate for maximum tax savings determined at the date of death of the first spouse and under then-applicable tax laws.

NOTE: This means that the survivor must consult with estate planning counsel in sufficient time make a disclaimer within nine months of date of death.

PRACTICE TIP: Harold and Wendy should be instructed that title to subsequently acquired assets of significant value should also be taken in the name of the trustee.

In addition to the revocable trust, the attorney will draft pourover wills and durable powers of attorney for Harold and Wendy. The pourover wills serve as a "backup" to the trust by directing that any assets not already titled in the name of the trustee or governed by a beneficiary designation are to be added to the revocable trust and administered as a part of it. In order to avoid the necessity of a court proceeding, the attorney should emphasize to Harold and Wendy the importance of holding assets of any significant value in the name of the trust and, with respect to assets such as life insurance and retirement benefits, that beneficiary designations are kept up-to-date and on file with the insurers and plan administrators.

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§11A.18 (a) At the First Death

As a way to show their love and affection for their grandchildren, Harold and Wendy decide to make a gift at the first death of $2500 to each grandchild. They recognize that there may be grandchildren born after the death of the first of them, in which case the survivor can make a lifetime gift to each later-born grandchild. As to any grandchild who has not attained the age of twenty-one (21), the bequest will be made to that grandchild's already established California Uniform Transfers to Minors Act (CUTMA) (Prob C §§3900-3925) account (see §11A.15) until the grandchild attains age 21. Harold and Wendy want their estate planning documents to be clear that adopted children such as David's son, George, will be treated in the same manner as natural born children.

The gift to any grandchild born after the first death will be distributed by the trustee to that child's parent who is the child of Harold and Wendy as Custodian under a CUTMA account. In the event that the parent is deceased or otherwise unable to serve, Harold and Wendy decide to name Catherine, then David. They have explained that they want to make sure that Beatrice's former husband does not gain control of Beatrice's children's assets and that they do not like what they consider to be Catherine's husband's lavish spending habits, even though they recognize that Steven can afford to spend large sums of money.

Further, although they want the survivor of them to be able to continue making gifts to grandchildren, they do not wish to have it be a requirement, because the survivor may need these funds or the survivor may determine that gifts to the child who is the parent of the grandchild may be more appropriate at any given time. For further discussion of gifts, see §11A.21.

Other than a $2500 bequest to each then-living grandchild, all assets will pass to the survivor, provided, however, that the survivor will be given the ability to disclaim some assets, with the disclaimed assets passing to a Disclaimer Trust.

For assets not placed in the trust, *i.e.,* the life insurance policy, the 401(k), pension and profit sharing plans, and IRA accounts, the spouse will be named as primary beneficiary. The trustee of the trust will be named as the alternate on the life insurance policy so that the proceeds will be paid out to the trustee and then be distributed according to the terms of the trust. There will not be any income tax consequence to distributing the life insurance proceeds to the trustee.

After considering the income tax consequences of distribution of the retirement benefits and the considerations discussed in §11A.9, Harold and Wendy decide that, after naming each other, they will name the trustee of the trust as the beneficiary.

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§11A.19 (b) At the Second Death

At the second death, the then-remaining assets will pass outright and free of trust to the children in equal shares, subject to the following provisions:

- Lifetime loans made to any child will be treated as an advancement of their equal share, but no interest will be applied.
- If a child is deceased, his or her share will pass to his or her children, if any, and if none, will be redistributed in equal shares among Harold and Wendy's other then-living children and then-deceased children who leave issue then living (with the equal share for a deceased child with issue distributed to such issue by right of representation) (see Prob C §246).
- Catherine's share will be treated as if she is deceased; that is, what would have been her share will pass immediately to her children, if any, and if she has no children, then in equal shares to her then-living siblings. Distributions to any of Catherine's children who have not yet reached age 21 will be distributed to a trust for his or her benefit.

Although Harold and Wendy are concerned about Aaron, they believe that it is likely that one of them will live at least another 20 years. In that time, if Aaron has overcome his drug problems and profligate spending habits, leaving assets to him outright would be fine. If not, the surviving spouse would be able to revise his or her estate plan to create a trust for Aaron. If something were to happen tomorrow, Harold and Wendy recognize that Aaron would inherit a large lump sum, but weighing the probabilities, they are comfortable with the decision to leave Aaron's inheritance to him free of trust.

Harold and Wendy decide that in the event all of their descendants are deceased, they would like their assets to be used for educational purposes, rather than be given to parents, siblings, nieces and nephews, or more collateral relatives.

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Source: Estate Planning/Complete Plans for Small and Mid-Size Estates/11A Plan for Married Couple With Adult Children/§11A.20 (2) Treatment of Specific Assets

§11A.20 (2) Treatment of Specific Assets

Harold and Wendy and the attorney should review each of their assets and determine what steps, if any, need to be taken with respect to the particular asset once their revocable trust is executed. See chap 12 for a fuller discussion of implementing the estate plan. The following is a summary of the actions that should be taken by Harold and Wendy.

Residence. Title will be conveyed from Harold and Wendy as joint tenants to Harold and Wendy as trustees of their revocable trust, with a notation on the deed confirming that the property was and remains community property. The attorney will prepare a deed and record it after Harold and Wendy execute it. At the time of recording, a Preliminary Change of Ownership (PCOR) will be filed with the County Assessor. There will be no reassessment of the property on this change of ownership.

Certificates of deposit. The bank issuer of each certificate of deposit should be advised to change title from Harold and Wendy as joint tenants to Harold and Wendy as trustees of their revocable trust. This should not trigger a penalty for early termination.

Credit union checking. The credit union should be advised to change title on the checking account from Harold and Wendy as joint tenants to Harold and Wendy as trustees of their revocable trust.

PRACTICE TIP: Harold and Wendy may wish to have their checks imprinted with just their names without reference to the trust.

Brokerage account. The broker should be advised to change title on the investment account from Harold and Wendy as joint tenants to Harold and Wendy as trustees of their revocable trust. The brokerage firm may have its own forms for such a change of title.

Interest in friend's company. Harold and Wendy should contact the transfer agent for the company and make arrangements to have their shares reissued in their names as trustees of their revocable trust.

Harold's 401(k), pension, and profit sharing plans. The ownership of the plan cannot be changed. However, Harold should make sure his primary beneficiary designation is up-to-date with Wendy named as the beneficiary. Having discussed with the attorney the need to designate a contingent beneficiary (see §11A.9), Harold will name the trustee of the revocable trust as the contingent beneficiary. Harold and Wendy are in agreement that none of their children will likely want to stretch out the receipt of benefits over the child's lifetime and that it is therefore unnecessary to seek additional tax expertise to make sure that the revocable trust has the terms that would allow such stretch-out. Harold and Wendy decided, on balance, that it is more important to have the retirement benefits combined with their other assets to ensure that the adjustments described in §11A.19 could be made to all assets passing to their children at the second death. Harold and Wendy understand that if their goals or circumstances change, they can seek additional tax expertise in the future to advise them on how to change the terms of the revocable trust to allow for stretched out payments. See discussion in §11A.9 regarding naming the trust as contingent beneficiary.

Wendy's pension benefits. The ownership of the plan cannot be changed. However, Wendy should make sure her beneficiary designation is up-to-date with Harold named as the primary beneficiary and the trustee of the revocable trust named as the contingent beneficiary. See discussion in §11A.9 regarding naming the trust as contingent beneficiary. See preceding paragraph regarding Wendy and Harold's decision-making process.

Harold's and Wendy's IRAs. The same considerations apply as described above for Harold's 401(k), pension, and profit sharing plans and Wendy's pension benefits.

Automobiles. Under California's Department of Motor Vehicles rules, it is cumbersome to re-title currently registered vehicles in the name of a revocable trust. Harold and Wendy may wish to keep title as is, but when purchasing new vehicles, take title in the name of the trust.

Furniture and furnishings, clothing, jewelry, and other personal effects. As there are no documents of title, a general assignment to the trustee will be executed at the same time the revocable trust agreement is signed.

Life insurance. Wendy will continue to be named as primary beneficiary. Harold will contact the insurance company and take the necessary steps to name the trustee of the revocable trust as the contingent beneficiary.

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§11A.21 (3) Gifts; Authority to Alter Estate Plan

Because Harold and Wendy would like to continue to be able to make gifts to help fund their grandchildren's education and would like to help their children with gifts if necessary, they decide to allow for gift-giving in the event of their incapacity. Weighing the ability to make gifts against the ability to abuse such power, they decide to allow an agent and successor trustee to make gifts that will be limited cumulatively to the amount of the annual exclusion from gift tax that each spouse is allowed to make, and to require that gifts be made equally to all children (or all grandchildren). The attorney should stress that the annual exclusion gift for each spouse is the aggregate amount of all gifts made by both fiduciaries in a given year (that is, if the trustee uses up Harold's annual exclusion, the agent has no power to make any additional gifts in Harold's name for that year, and vice versa).

The attorney should discuss with Harold and Wendy the need to coordinate some powers, such as gift giving powers, in the revocable trust (where most of the assets will be held) and in the durable power of attorney. In the event that gifts would be made from nontrust assets, the power of attorney should also include a power to make gifts in the same limited fashion as in the trust. Under Prob C §4264(c), the power to make gifts must be express in the power of attorney. Probate Code §15401(c) requires express authority in the trust document to authorize an agent under a power of attorney to modify or revoke a trust.

Harold and Wendy also decide to limit the ability of any trustee, other than either of them, to make changes to their estate plan. While this may limit flexibility to address changed family circumstances or changed tax laws, Harold and Wendy feel that, for the moment, they are more comfortable knowing that their estate plan cannot be changed by someone other than the other of them.

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§11A.22 (4) Actions After Plan Documents Signed

The attorney should remind Harold and Wendy that even after the documents are finalized and signed, there will be tasks that require their immediate attention, and further actions that will be required at the first death and then at the second death. In particular:

- After execution of the revocable trust, title to assets will need to be transferred to the trust;
- Beneficiary designations for retirement plans and insurance policies should be kept up-to-date;
- Consider whether newly acquired assets are significant enough to take title in the name of the trust; and
- The surviving spouse, at the first death, will have to consider whether to create the disclaimer trust and take action within 9 months of the decedent spouse's date of death.

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2. Who Will Control Decisions About Assets

§11A.23 a. Roles of Different Fiduciaries

The attorney should explain to Harold and Wendy the various roles and titles of the person or persons who will control their assets. While both Harold and Wendy are alive and have capacity they will retain control and management of their assets. To prepare for the possibility of incapacity of one or both and for the first and second deaths, however, they need to designate those persons who will have authority over their assets. Who controls which assets will depend on how title is held to the particular asset.

Trustee. The trustee(s) of the trust will have authority to deal with issues of property management that arise due to the incapacity and death of either or both of them (see §11A.24). The trustee of the trust (first the surviving spouse, then Catherine, then David) will have responsibility for the following:

- At the first death, settling the deceased spouse's affairs, including distribution of assets to the Survivor's Trust and the Disclaimer Trust, if one is elected;
- For the period between the first and second death, administering the Survivors' Trust and the Disclaimer Trust, if any, for the benefit of the surviving spouse; and
- At the second death, settling the surviving spouse's affairs and distributing the property according to the terms of the trust(s) to children and grandchildren.
- Harold and Wendy are not providing for any continuing trusts for their children or grandchildren, except for Catherine's children, if any. However, the trustee will have the responsibility for distributing specific cash gifts of $2500 to the custodian of the California Uniform Transfers to Minors Act (CUTMA) (Prob C §§3900-3925) account that already exists or that may be opened to hold any assets passing to a beneficiary not yet age 21, to be held in the CUTMA account until the beneficiary attains age 21.

Agent. While a spouse is alive but incapacitated or otherwise unable to act, the agent under that spouse's power of attorney will have authority to deal with nontrust assets and other issues of property and benefits management. See §11A.26. An agent can also be designated who will have authority to make personal care decisions for a spouse who is alive but incapacitated or otherwise unable to act. The agent would have authority only over nontrust assets. See §11A.27.

NOTE 1: The powers of the agent under the durable power of attorney for financial matters terminate at the death of the principal (see Prob C §4152), so the agent will have no authority to handle post-death financial matters for a decedent.

NOTE 2: While both are alive, Harold and Wendy can use community property management statutes contained in the Probate Code that authorize a spouse to act when the other spouse is incapacitated. See §11A.25.

Conservator. If a conservator of the estate is needed, that fiduciary would have authority over nontrust assets that become part of the conservatorship estate. See §11A.28.

Executor. The executor, whose job does not begin until the decedent dies and only after a court appoints him or her to that position, would be responsible for administering the decedent's estate to the extent that the deceased person's assets are subject to his or her will. Because assets owned by the trustee of the revocable trust are not governed by the decedent's will, if all (or almost all) of Harold and Wendy's assets are titled in the name of the trustee of their revocable trust, it may not be necessary to have an executor appointed. See §11A.29.

For general considerations in selecting fiduciaries that the attorney should discuss with Harold and Wendy, see §§4.12-4.15; see also §9.22.

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§11A.24 b. Trustee of Revocable Trust Controls Trust Assets

The revocable trust will provide that Harold and Wendy are both trustees initially but if one of them fails or ceases to serve for any reason, *e.g.,* incapacity or death, the other will continue to serve as sole trustee. Similarly, the revocable trust states what happens if both fail or cease to serve as trustee, whether this is a result of incapacity or death. Finally, the revocable trust will include provisions for who will distribute assets at the second death and who will manage property left to a beneficiary who is not age 21.

Harold and Wendy agree that if both of them cannot serve—whether during their joint lifetimes, following the death of the first of them, and following the death of the survivor of them—that first Catherine and then David will serve as successor trustee. The same order of succession will apply to the disclaimer trust, if one is created at the first death. The same order of succession will also apply to any trusts for minors that might be created when both Harold and Wendy are deceased, although Catherine (or David) has the power to name a successor if another adult would be more appropriate.

It is important for Harold and Wendy to understand that the terms of the revocable trust do not apply to nontrust assets. For example, retirement plan elections cannot be made by the trustee of the revocable trust. With respect to nontrust assets, the rules relating to community property described in §11.14 would apply and, because of the limitations of the community property management rules, a durable power of attorney should be executed. See further discussion in §11A.25-11A.29.

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Source: Estate Planning/Complete Plans for Small and Mid-Size Estates/11A Plan for Married Couple With Adult Children/ c. Control of Nontrust Assets and Financial Matters/§11A.25 (1) Each Has Control of Community Property While Both Alive

c. Control of Nontrust Assets and Financial Matters

§11A.25 (1) Each Has Control of Community Property While Both Alive

With regard to community property not held in the trust, if either Harold or Wendy becomes incapacitated, the other spouse would have control over that property. Prob C §3051. This is not a complete solution for nontrust community property, however, because certain actions, *e.g.,* those concerning real property transactions or gift transactions, would require court authority under Prob C §§3100-3111A. Because of the necessity that at least one spouse have legal capacity and the possible requirement of a court order to allow the spouse to act, these statutory provisions should be supplemented by other methods for asset management in the event of incapacity.

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§11A.26 (2) Durable Power of Attorney

Harold and Wendy agree that each will designate the other as agent under his or her durable power of attorney and that the agent's power will be effective immediately. They will name Catherine, and then David, as successor agents under each of their durable powers of attorney. The attorney should discuss with Harold and Wendy whether Catherine's and David's authority will also be effective immediately. See discussion in §§11.16-11.18 for considerations in naming successor agents and the powers to be given to agents under a power of attorney. Harold and Wendy decide to have attorney-drafted powers of attorney. They want the power of agents other than themselves effective only on incapacity and to require the certificates of two physicians to establish incapacity.

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§11A.27 (3) Personal Care Decisions

Harold and Wendy agree to appoint an agent to make "personal care decisions," such as determining where a person will live, choosing caregivers, selecting clothing, arranging recreational activities, and providing transportation. See §9.28. These decisions frequently fall in between financial and health care decisions and may be included in the powers given to an agent under either an advance health care directive or an agent under a durable power of attorney for property management. The person named to make these personal care decisions need not be the person named to handle financial matters.

Harold and Wendy will name each other first and are initially thinking of naming Beatrice as the alternate to make personal care decisions with Catherine as the alternate in charge of the related financial arrangements. After discussing these issues with the attorney, Harold and Wendy realize that:

- It will be important, in the event of incapacity, to have efficient coordination between the person charged with making personal care decisions and the person who will need to pay for them; and that
- Beatrice is already overburdened in caring for her children and may not be the best choice for these additional time-intensive responsibilities.

Harold and Wendy decide to name the same person to make financial and personal care decisions and they will therefore include personal care decisions in their durable powers of attorney for property management. After naming each other, they will name Catherine, and then David, as the alternates in their powers of attorney for property management. Because Catherine (and then David) is named as successor trustee in the event of the incapacity of both Harold and Wendy, as well as successor agent under the durable powers of attorney, coordination should be seamless.

The agent under the durable power of attorney will be authorized to make personal care decisions.

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§11A.28 (4) Nomination of Conservator

The attorney should explain to Harold and Wendy the nature and purpose of a conservatorship, the differences between a conservator of the person and of the estate, and that a primary purpose of a revocable trust and a durable power of attorney is to avoid the need to appoint a conservator of both the person and estate in the event of incapacity. See §9.30 regarding the grounds for appointment of a conservator of the person, estate, or both.

The conservator of the person has the "care, custody, and control" of the conservatee. Prob C §23519(a). The conservator of the person must decide where the conservatee will live, how meals, clothing, and entertainment will be provided, what daily routines will be followed, and similar matters. A high degree of personal supervision may be required.

The conservator of the estate manages the property that becomes part of the conservatorship estate on behalf of the conservatee. These responsibilities usually do not require the same degree of personal supervision as a conservatorship of the person.

The attorney explains to Harold and Wendy that, although the use of the revocable trust and durable power of attorney should eliminate the need for a conservator of the estate, it is advisable to take the precaution of nominating conservators of the person and estate in the durable power of attorney. If for some unexpected reason (*e.g.,* an unusual transaction not authorized by the trust or the power of attorney) it becomes necessary for a conservator to be appointed, the court will have the benefit of knowing the client's wishes regarding the nominee and intended scope of authority over assets. The attorney should also discuss with Harold and Wendy any of the other issues mentioned in §9.30 that the attorney thinks would be helpful. The nomination could be included in a stand-alone document or in an advance health care directive rather than in the financial power of attorney, but those methods have drawbacks (see §11.20 for examples). Therefore, Harold and Wendy agree that the nomination will be included in their powers of attorney. Consistent with their other decisions, they will name each other first, then Catherine, and then David as conservator of the estate and person.

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Source: Estate Planning/Complete Plans for Small and Mid-Size Estates/11A Plan for Married Couple With Adult Children/§11A.29 (5) Executor

§11A.29 (5) Executor

Harold and Wendy will name each other executor in their wills and will nominate Catherine and then David as the alternates.

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§11A.30 d. Summary of Harold and Wendy's Decisions

While Harold and Wendy are both alive, they will handle their own financial and legal matters. If one becomes incapacitated, the other will continue to manage their affairs. At the death of the first of them to die, Harold and Wendy naturally will want the other to handle all legal and financial matters. This is true for settling the deceased spouse's affairs and with respect to ongoing responsibility for inherited assets (whether inherited outright by the survivor or placed in a Disclaimer Trust). The surviving spouse will be familiar with the assets and no other family member or other person will need to become involved at the first death.

If both become incapacitated, or, if at the death of the first spouse, the surviving spouse does not serve or subsequently becomes incapacitated or for any other reason will not continue to serve, and at the death of the surviving spouse, Catherine and then David will be named as successor trustee and successor agent under each of their durable powers of attorney (which will include power to make personal care decisions), and successor nominee as conservator and successor executor.

Although Catherine and David are busy with careers and family, Harold and Wendy know that they are responsible and will want to help their parents. Harold and Wendy also believe that if the time requirements are excessive Catherine and David will use good judgment in finding professional advisors who can be of assistance (attorneys, accountants, bookkeepers, investment advisors, etc.).

In discussing whether the other children, Beatrice or Aaron, should be named as further successors, Harold and Wendy expressed their concern that Beatrice is already too burdened with her own family and that Aaron is currently not a good candidate for a fiduciary role. Recognizing that the trustee of their revocable trust will have the primary responsibility for handling financial matters in the event both of them are incapacitated, Harold and Wendy decide that they will provide that any serving trustee of their revocable has the power to name his or her own successor, provided that if Catherine does not serve or does not continue to serve, David's appointment will have priority. In this way, individuals in whom Harold and Wendy repose great confidence will be able to make the decision as to a successor trustee based on circumstances as they exist at the time a further successor may be necessary.

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Source: Estate Planning/Complete Plans for Small and Mid-Size Estates/11A Plan for Married Couple With Adult Children/§11A.31 E. Formulating the Estate Plan for Health Care Decisions

§11A.31 E. Formulating the Estate Plan for Health Care Decisions

No estate plan is complete without providing for the manner in which health care decisions will be made if either Harold or Wendy is unable to make such decisions personally. The attorney should explain that California law allows any adult to execute a written advance health care directive (AHCD), which can include either or both of the following (Prob C §§4605, 4629):

- A power of attorney naming someone to make health care decisions; and
- Health care instructions (including "pull the plug" instructions).

Harold and Wendy's attorney generally uses the California Medical Association form, which contains both options, because it is recognized by health care providers throughout California and is often more readily accepted than less familiar forms. The attorney should review the form with them and make sure they understand that they can choose to fill out either part or both parts.

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§11A.32 1. Statement of Wishes

The California Medical Association (CMA) form of Advance Health Care Directive provides additional space to include specific, personal directions and wishes, and the attorney should discuss the possibility of including these with Harold and Wendy. Because Harold and Wendy are healthy, with no medical conditions requiring particular instructions, they do not want to include any instructions. They want to leave the document as broadly worded as possible. If Harold or Wendy did have special health care concerns, the attorney should suggest that they discuss these issues with the appropriate physician and add specific language to the CMA form.

Neither Harold nor Wendy wants to be kept alive artificially and both wish to be organ donors. They will therefore include these instructions in their advance health care directives. The attorney should give Harold and Wendy information about other steps to take regarding organ donations. See §§7.55A, 7.63, 10.26. They have not decided whether they want to be buried or cremated and decide not to make any statement about that.

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§11A.33 2. Agent Under Power of Attorney for Health Care Decisions

For discussion of the issues that should be discussed with Harold and Wendy regarding the choice of their agents under the power of attorney for health care decisions, see §§9.35-9.36.

Harold and Wendy will each name the other as agent, knowing that they have the same views about health care end-of-life issues. Each wants Catherine to be named as the first alternate agent and David as the second alternate. They are confident that their named successor agents would follow their wishes. They do not see any reason to make the power of attorney for health care decisions effective immediately.

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§11A.34 III. SAMPLE FORMS

The attorney will prepare the following documents to implement Harold and Wendy's estate plan:

- Declaration of Revocable Trust;
- Wills for each of them ("pourover" wills);
- Durable Powers of Attorney for property management for each of them; and
- Advance Health Care Directives. The instructions to husband and wife in §11.31 for filling out the form can be adopted for Harold and Wendy.

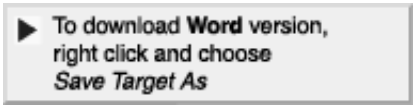
In addition, the attorney will prepare:

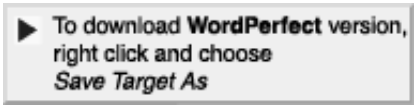
- A deed transferring the residence property from Harold and Wendy as joint tenants to Harold and Wendy as trustees of their revocable trust, with a notation that it was and remains community property.
- A Preliminary Change of Ownership Report (PCOR) to accompany the deed; the attorney will fill in the information on the top part of page 1 of the form and check the "Yes" box in PART 1, Item H.2 (transfer to revocable trust), the "No" box for the other Items in PART 1, and fill in the Certification on page 2 except for the signatures of Harold and Wendy.
- A Certification of Trust. See §12.27 for sample form.
- A transmittal letter that will include a summary of their estate plan and general transfer instructions for retitling their certificates of deposit, checking account, brokerage account, interest in startup company, and tangible personal property in the name of the trust. For sample transmittal letters, see §§9.44, 10.37, 11.32, 12.75. The transmittal letter for Harold and Wendy should include instructions about reregistering the cars in both names, if they wish to do so; and sample language to designate the alternate beneficiaries of IRAs, retirement benefits, and life insurance policies. With respect to beneficiaries of IRAs and retirement plan benefits, the letter should also remind Harold and Wendy of the following:
- That they named the trustee of the revocable trust to receive all such benefits at the second death but that the terms of the revocable trust may not allow each child to elect to receive benefits stretched out over his or her lifetime; and
- If they wish to change the trust terms to ensure that benefits can be stretched out, they must consult with a tax professional with an appropriate level of tax expertise.

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Source: Estate Planning/Complete Plans for Small and Mid-Size Estates/11A Plan for Married Couple With Adult Children/§11A.35 A. Form: Revocable Trust

§11A.35 A. Form: Revocable Trust





WARNING: This form is a sample based on the hypothetical in this chapter only. It is provided by the authors. The form has been modified to follow the format of the forms in Drafting California Revocable Trusts (4th ed Cal CEB 2003). The drafter should refer to the text of Revocable Trusts before preparing a trust document.

THE HAROLD AND WENDY OLDER REVOCABLE TRUST

OPENING DECLARATION

ARTICLE 1. CREATION OF TRUST

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1.2. Character of Trust Property

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2.1. Purposes of Trust

2.2. Initial Trustees

2.3. Successor Trustees

2.4. Family Information

ARTICLE 3. DISTRIBUTIONS WHILE BOTH SETTLORS ARE LIVING

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3.2. Distributions of Separate Property

3.3. Continuation of Gifting Program

ARTICLE 4. DISTRIBUTION ON FIRST DEATH

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4.2. Surviving Settlor's Property

4.3. Deceased Settlor's Power of Appointment

4.4. Deceased Settlor's Property That Is Not Effectively Appointed

4.5. Survivor's Trust as Only Trust

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5.2. Distribution on Death—General Power of Appointment

5.3. Distribution on Death—Property Not Appointed

ARTICLE 6. DISCLAIMER TRUST

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6.2. Surviving Settlor's Disclaimer of Mandatory Income Interest

6.3. Surviving Settlor's Disclaimer of All Rights in Disclaimer Trust

6.4. Distribution on Surviving Settlor's Death

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7.1. Interest on Pecuniary Amounts

7.2. Undistributed Income

7.3. Distributions to Young Persons

7.4. Distribution Terminology

7.5. Distribution Powers

7.6. Limitations on Discretionary Distributions to Trustee

7.7. Prohibition Against Discharge of Support Obligation

7.8. Apportionment of Taxes

7.9. Transfer Taxes Caused by Disclaimer

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8.2. Allocation Between Deceased Settlor and Surviving Settlor

8.3. Debts of Surviving Settlor and Estate

8.4. Limitations on Sources of Payments

ARTICLE 9. OFFICE OF TRUSTEE

9.1. Definition of Trustee

9.2. Scope of Trustee Provisions

9.3. Resignation of Trustee

9.4. Removal of Any Trustee

9.5. Power to Name Successor Trustee

9.6. Applicable Rules for Cotrustees

9.7. Compensation of Trustees

ARTICLE 10. TRUSTEE POWERS

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10.2. Specific Powers of Trustee

ARTICLE 11. TRUSTEE DUTIES, LIMITATIONS ON DUTIES, EXCULPATION

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11.2. Limitations on Trustee's Duty of Loyalty

11.3. Acceptance of Additions

11.4. Exculpation of Trustee

11.5. Cotrustee's Duty to Act

11.6. Limitation on Duty to Investigate Predecessor or Cotrustee

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12.1. Applicable Law

12.2. Context

ARTICLE 13. MISCELLANEOUS

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13.2. Exception: Joint Tenancy Property

13.3. Spendthrift Clause

13.4. Rule Against Perpetuities

ARTICLE 14. REVOCATION, AMENDMENT, AND EXERCISE OF APPOINTMENT POWERS

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14.2. Procedural Requirements for Amending or Revoking Trusts

14.3. Effect of Defective Documents

14.4. Revocation by Gift

14.5. Effect of Amendment Not Acceptable to Trustee

14.6. Limitation on Exercise of Powers by Conservator or Guardian of Estate

14.7. Exercise of Powers of Appointment

Signatures; Acknowledgment

EXHIBIT A

Initial Trust Property

THE HAROLD AND WENDY OLDER REVOCABLE TRUST

We, Harold Older and Wendy Older, sometimes hereafter called "settlors," residing in Sacramento County, California, hereby create The Harold and Wendy Older Revocable Trust, declaring:

ARTICLE 1
CREATION OF TRUST

1.1. *Initial Trust Property.* The property described in the attached listing of "Initial Trust Property," marked "Exhibit A," is now held by us in trust. This property and any other property later transferred to the trust is hereafter referred to as the trust property and shall be held, administered, and distributed as provided in this document and any subsequent amendments to this document.

1.2. *Character of Trust Property.* All of the property on the attached listing of trust property is our community property.

ARTICLE 2
PURPOSES, TRUSTEES, AND FAMILY DECLARATIONS

2.1. *Purposes of Trust*. The primary purposes of this trust are:

2.1.1. *Care of Settlors.* To provide for our care and maintenance as long as either of us is living;

2.1.2. *Avoid Conservatorship.* To facilitate management of the trust property in the event of the incapacity of one or both of us;

2.1.3. *Transfer Property at Death.* To facilitate transfer of the trust property on our deaths; and

2.1.4. *Tax Planning.* To provide opportunities for reducing and/or postponing taxes which might be imposed as a result of our deaths.

2.2. *Initial Trustees.* We are the initial trustees of this trust.

2.3. *Successor Trustees.* If either of us ceases to be a trustee of trust, the other shall become the sole trustee. If the sole trustee resigns or ceases to be trustee, our daughter, Catherine Older, shall become trustee, and if she fails to qualify, resigns, or ceases to act, our son, David Older, shall become the trustee. Except as otherwise provided, the provisions of this document concerning the identity of trustees apply to all trusts established by this document.

2.4. *Family Information.* In connection with the administration of this trust, the trustee may rely on the following family information:

2.4.1. *Marriage*. We are husband and wife and were married in San Francisco, California, on January 2, 1973.

2.4.2. *Citizenship*. We are both citizens of the United States.

2.4.3. *Children*. The names and birth dates of our children are: David Older, December 31, 1973; Catherine Older, December 1, 1975; Beatrice Older, August 1, 1978; and Aaron Older, February 2, 1982.

2.4.4. *Deceased Children*. Neither of us have deceased children who are survived by issue now living.

ARTICLE 3
DISTRIBUTIONS WHILE BOTH SETTLORS ARE LIVING

3.1. *Distributions of Community Property.* While we are both living, the trustee shall pay to us, or apply for our benefit, as much of the community property income and principal of this trust as either of us requests plus such additional sums as the trustee in its discretion determines are appropriate for our health, education, maintenance, support, comfort, and welfare in accordance with our accustomed standard of living. All distributions of community property income or principal shall be distributed to or for our benefit as community property.

3.2. *Distributions of Separate Property.* While we are both living, and with respect to trust property that is the separate property of one of us (the "owning settlor"), the trustee shall pay to the owning settlor or apply for his or her benefit as much of the owning settlor's separate property income and principal as shall be distributed or the owning settlor requests, plus such additional sums as the trustee in its discretion determines are appropriate for the owning settlor's health, education, maintenance, support, comfort, and welfare in accordance with the owning settlor's accustomed standard of living.

3.3. *Continuation of Gifting Program*. If one or both of us lack capacity to direct distributions or other use of trust property, then during such period of incapacity, distributions from the trust to one or more of the group consisting of our descendants, as a continuation of a gifting program established during our lives by us, or either of us, may be made as follows:

(i) The trustee may in the trustee's sole and absolute discretion make such distributions from the trust estate;

(ii) The trustee shall follow any direction of an agent for either or both of us to distribute property from the trust if such agent has been expressly authorized to make gifts on our behalf in a durable power of attorney.

All distributions at a given generational level (for example, to all children) must be of equal amounts to the then-living descendants in that generation and no distribution to a descendant of ours may exceed, in the aggregate from all of our sources, the annual exclusion from gift tax (as defined in Internal Revenue Code §2503(b) or any successor section) in any calendar year.

ARTICLE 4
DISTRIBUTION ON FIRST DEATH

On the death of whichever of us is the first to die (the "Deceased Settlor"), the trust estate shall be distributed as follows:

4.1 *Gifts to Grandchildren.* The trustee shall distribute the sum of Two Thousand Five Hundred Dollars ($2500) from the Deceased Settlor's share of the trust estate to each grandchild of Settlors who survives the Deceased Settlor; provided, however, that if a grandchild has not yet attained the age of twenty-one (21), distribution shall be made to the custodian of any existing California Uniform Transfers to Minors Act (CUTMA) account for such grandchild and if there is no such existing CUTMA account, the trustee shall make such distribution to the child of the Settlors who is the parent of the grandchild as custodian under the CUTMA, with the other parent of the grandchild named as successor custodian, except, however, that if there is no other parent of the grandchild then living, Settlor's daughter, Catherine Older, shall be named as the successor or alternate custodian, except that such distribution to the child of the Settlors' son David or the Settlors' daughter Beatrice shall be made to the Settlor's daughter, Catherine Older, as the successor or alternate custodian.

4.2. *Surviving Settlor's Property.* After making the distributions described in 4.1, the property of the survivor of us (the "Surviving Settlor") held as a part of the trust estate (including any additions made by the will of the Deceased Settlor or by any insurance or benefit plan proceeds or otherwise) shall be distributed to the trustee of the Survivor's Trust described in the next Division.

4.3. *Deceased Settlor's Power of Appointment*. The trustee shall distribute the trust property of the Deceased Settlor to such one or more persons and entities, including such Deceased Settlor's own estate, and on such terms and conditions, either outright or in trust, as such Deceased Settlor shall appoint by will, or by an inter vivos instrument providing for a disposition to take effect upon such Deceased Settlor's death, which will or instrument specifically refers to and exercises this power of appointment. Such power of appointment shall be exercisable by the Deceased Settlor alone and shall be exercisable in all events. The will or instrument which exercises such power of appointment which bears the latest date shall supersede all prior dated wills or instruments in conflict therewith.

4.4. *Deceased Settlor's Property That Is Not Effectively Appointed*. The trustee shall distribute any of the Deceased Settlor's property held as part of the trust estate that was not effectively appointed by the Deceased Settlor under the preceding paragraph to the trustee of the Survivor's Trust. Notwithstanding the foregoing, if the Surviving Settlor disclaims surviving his or her entire interest in a portion or all of the Deceased Settlor's property, such portion so disclaimed shall instead be distributed to the trustee of a trust designated as the

"Disclaimer Trust", to be held, administered, and distributed as described in Article 6. The Surviving Settlor shall not have a special power of appointment over such portion or any other power, as trustee or otherwise, to direct the beneficial enjoyment of the Disclaimer Trust to any person.

4.5. *Survivor's Trust as Only Trust.* If the Survivor's Trust is the only trust established on the death of the Deceased Settlor, a transfer to that trust need not be evidenced by a change of title.

ARTICLE 5
SURVIVOR'S TRUST

5.1. *Distributions During Surviving Settlor's Lifetime*. During the lifetime of the Surviving Settlor, the trustee shall pay to or apply to the benefit of the Surviving Settlor as much of the income and principal of the Survivor's Trust as the Surviving Settlor requests, plus such additional sums as the trustee, in the trustee's discretion, determines are appropriate for the Surviving Settlor's health, maintenance, support, education, comfort, and welfare, in accordance with his or her accustomed standard of living. In addition, the trustee shall pay to the Surviving Settlor during the Surviving Settlor's lifetime, from the Survivor's Trust, such amounts as the surviving Settlor may from time to time request in writing, up to the whole of the trust property.

5.2. *Distribution on Death—General Power of Appointment*. On the death of the Surviving Settlor, the trustee shall distribute the remaining trust property as the Surviving Settlor appoints in accordance with the provisions of this trust for exercising a power of appointment. This is a general power of appointment that may be exercised in favor of any desired appointee, including the Surviving Settlor's estate.

5.3. *Distribution on Death—Property Not Appointed*. On the death of the Surviving Settlor, any property not effectively appointed by the Surviving Settlor shall be distributed as follows:

On the death of the Surviving Settlor, the trustee shall divide the Survivor's Trust into as many equal shares as there are children of Settlors then living and children of Settlors then deceased living issue then living. The trustee shall allocate one (1) such equal share to each living child of Settlors, which share shall be distributed to such child outright and free of trust. The Trustee shall allocate one (1) such equal share to each group composed of the living issue of a deceased child of Settlors, which share shall be further subdivided among such issue by right of representation. Each subshare shall be allocated to a descendant of Settlors and shall be distributed to such descendant outright and free of trust.

The foregoing distribution, however, shall be subject to the following provisions:

5.3.1. *Equalization Regarding Loans*. Notwithstanding the foregoing, if Settlors or the trustee have made any loans to any of the children of Settlors that remain unpaid at the death of Surviving Settlor, the trustee shall distribute, free of tax and free of trust, to such child (or issue of a predeceased child), as part of the equal share described above, the amount that remains due on such obligation as of the date of Surviving Settlor's death (an "equalizing distribution"). The trustee's determination of whether a loan was made to a child, and the amount remaining due from any loan, shall be binding on all beneficiaries.

The foregoing provision requiring the trustee to make equalizing distributions shall be made whether or not the loan to a child of Settlors was written or verbal, whether secured or unsecured, and whether or not enforceable as a matter for law. For example, a loan discharged in bankruptcy or otherwise uncollectible because the statute of limitations has expired shall nevertheless be treated as a loan for purposes of making the equalizing distributions provided for above.

In the event there are insufficient funds to make the above-described equalizing distributions, they shall abate proportionately. If there are insufficient funds to make the above-described equalizing distributions, the trustee shall pursue collection of all or any portion of such loan not forgiven under the above provisions to the extent that collection of such loan is not barred by law.

5.3.2. *Distribution to Catherine*. If Catherine survives the Surviving Settlor, the share that would otherwise be distributed to her shall instead be distributed to those of her issue who survive the Surviving Settlor by right of representation. Any distribution to a minor descendant of Catherine shall be distributed in accordance with the provisions of Article 7, Paragraph 3 (7.3) of this instrument.

ARTICLE 6

DISCLAIMER TRUST

6.1. *Distribution During Surviving Settlor's Lifetime*. During the lifetime of the Surviving Settlor, the trustee shall pay to or apply for the benefit of the Surviving Settlor all income of the Disclaimer Trust in quarter-annual or more frequent intervals, plus as much of the principal as the trustee in its discretion determines is appropriate for the Surviving Settlor's health, education, and support. In exercising its discretion, the trustee may take into account other income and resources available to the Surviving Settlor to such extent, if any, as the trustee deems appropriate.

6.2. *Surviving Settlor's Disclaimer of Mandatory Income Interest*. If the Surviving Settlor also disclaims the right to receive mandatory income distributions from the Disclaimer Trust without disclaiming rights to principal, income shall be added to principal and the trustee shall pay to the Surviving Settlor as much of the trust property as the trustee in its discretion determines is appropriate for the Surviving Settlor's health, education, and support. In exercising its discretion, the trustee may consider other income and resources available to the Surviving Settlor to such extent, if any, as the trustee deems appropriate.

6.3. *Surviving Settlor's Disclaimer of All Rights in Disclaimer Trust*. If the Surviving Settlor disclaims all rights to principal and income with respect to all or a fractional share of the Disclaimer Trust, the property so disclaimed shall be distributed in the manner provided in the next paragraph, except that solely for the purpose of applying the survivorship requirements in the next paragraph, the Surviving Settlor will be deemed to have died on the date of death of the Deceased Settlor.

6.4. *Distribution on Surviving Settlor's Death.* On the death of the Surviving Settlor, the remaining property of the Disclaimer Trust shall be distributed as follows:

On the death of the Surviving Settlor, the trustee shall divide the Disclaimer Trust into as many equal shares as there are children of Settlors then living and children of Settlors then deceased living issue then living. The trustee shall allocate one (1) such equal share to each living child of Settlors, which share shall be distributed to such child outright and free of trust. The trustee shall allocate one (1) such equal share to each group composed of the living issue of a deceased child of Settlors, which share shall be further subdivided among such issue by right of representation. Each subshare shall be allocated to a descendant of Settlors and shall be distributed to such descendant outright and free of trust.

The foregoing distribution, however, shall be subject to the following provisions:

6.4.1. *Equalization Regarding Loans*. Notwithstanding the foregoing, if Settlors or the trustee have made any loans to any of the children of Settlors that remain unpaid at the death of Surviving Settlor, the trustee shall distribute, free of tax and free of trust, to such child (or issue of a predeceased child), as part of the equal share described above, the amount that remains due on such obligation as of the date of Surviving Settlor's death (an "equalizing distribution"). The trustee's determination of whether a loan was made to a child, and the amount remaining due from any loan, shall be binding on all beneficiaries.

The foregoing provision requiring the Trustee to make equalizing distributions shall be made whether or not the loan to a child of Settlors was written or verbal, whether secured or unsecured, and whether or not enforceable as a matter for law. For example, a loan discharged in bankruptcy or otherwise uncollectible because the statute of limitations has expired shall nevertheless be treated as a loan for purposes of making the equalizing distributions provided for above.

In the event there are insufficient funds to make the above-described equalizing distributions, they shall abate proportionately. If there are insufficient funds to make the above-described equalizing distributions, the trustee shall pursue collection of all or any portion of such loan not forgiven under the above provisions to the extent that collection of such loan is not barred by law.

This provision shall not apply to the extent that such equalizing distribution has been made from the Survivor's Trust.

6.4.2. *Distribution to Catherine*. If Catherine survives Surviving Settlor, the share that would otherwise be distributed to her shall instead be distributed to those of her issue who survive Surviving Settlor by right of representation. Any distribution to a minor descendant of Catherine shall be distributed in accordance with the provisions of Article 7, Paragraph 3 (7.3) of this instrument.

ARTICLE 7
ADDITIONAL DISTRIBUTION PROVISIONS

7.1. ***Interest on Pecuniary Amounts.*** **When a beneficiary is entitled to receive payment of a pecuniary amount or an annuity, the beneficiary shall be entitled to receive interest on delayed distributions to the extent provided by California law. If California law has no provision expressly applicable to trusts, interest shall be paid in accordance with California law applicable to a decedent's estate.**

7.2. ***Undistributed Income*****. In any instance in which this document fails to expressly provide for the distribution or accumulation of any trust income, that income shall be accumulated and added to principal.**

7.3. ***Distributions to Young Persons.*** **If any person otherwise entitled to outright distribution of any property from any trust created by this document is under the age of twenty-one (21) at the time of distribution, the trustee shall not make the distribution, but shall, instead, retain the property that would otherwise be distributed in a separate trust for the benefit of the underage person ("Beneficiary"). The separate trust shall be administered as follows:**

7.3.1. ***Unproductive Property.*** **The trustee shall hold as unproductive property any property that the trustee in its discretion determines should be preserved for distribution in kind to Beneficiary, including, in particular, tangible personal property of sentimental value. Such property shall be distributed to Beneficiary at such time as the trustee deems appropriate, but no later than the time of distribution of the remaining property.**

7.3.2. ***Periodic Distributions.*** **The trustee shall pay to or for the benefit of Beneficiary, quarter-annually or at more frequent intervals, as much of the income and principal of the trust as the trustee, in the trustee's discretion, considers advisable for Beneficiary's support, health, and education, including professional education, after taking into consideration other resources of Beneficiary, the resources of the trust, and the likely future needs of Beneficiary within the trust term.**

7.3.3. ***Additional Distributions of Principal; Termination.*** **When Beneficiary attains the age of twenty-one (21), the trustee shall distribute to Beneficiary the entire remaining trust property.**

7.3.4. ***Power to Delay Distributions.*** **Despite the foregoing distribution provisions, the trustee may delay any distribution until a time no later than Beneficiary's death if the trustee determines that it is reasonably certain that the distributions are not in the Beneficiary's best interests because the beneficiary is incompetent, suffers from substance abuse, or because Beneficiary's financial circumstances are such that failure to delay distributions will actually reduce the trust benefits to Beneficiary.**

7.3.5. ***Beneficiary's Failure to Survive*****. If Beneficiary dies before final distribution, the trust shall terminate and the remaining trust property shall be distributed to such persons, including Beneficiary's estate and creditors, as Beneficiary may appoint under the provisions of this trust for exercising a power of appointment. If this appointment power is not effectively exercised with respect to any trust property, that property shall be distributed to the then surviving issue of Beneficiary, per capita at each generation, and, if none, then to the then living siblings of the Beneficiary, with the then living issue of deceased siblings taking the shares of deceased siblings per capita at each generation; and, if none, then to the persons entitled to the Beneficiary's estate under the California laws of succession.**

7.3.6. ***Trustee.*** **The trustee of any trust established under this paragraph 7.3 shall have the power to name successors and may amend the trust to provide for administration of the trust by multiple trustees in such manner as the trustee deems appropriate. The trustee is encouraged to provide a trustee arrangement that results in more than one adult having access to the books and records of the trust during Beneficiary's minority. The provisions of this document concerning trustees shall continue to apply to this trust to the extent not inconsistent with exercises of the powers of the trustee granted in this subparagraph.**

7.4. ***Distribution Terminology*****. The following directions and definitions apply to the distribution provisions of this trust.**

7.4.1. ***Charity.*** **A "charity" is any organization described in Internal Revenue Code §2055 or §2522.**

7.4.2. ***Distribution by Right of Representation*****. In making a distribution at each generation, the trustee shall**

divide the property to be distributed into as many equal shares as there are living children of the designated ancestor, if any, and deceased children who leave issue then living. Each living child of the designated ancestor is allocated one share, and the share of each deceased child who leaves issue then living is divided in the same manner.

7.4.3. *Education.* "Education" includes primary, secondary, vocational, college, university, postgraduate study, and other specialized studies if in the trustee's discretion the study is being pursued to advantage by the beneficiary.

7.4.4. *Terms of Relationship*. Except as expressly provided in this paragraph, halfbloods, adopted persons, persons born out of wedlock, stepchildren, foster children, and the issue of these persons when appropriate to the class, are included or excluded in terms of class gift or relationship in accordance with California law for determining relationship and inheritance rights for purposes of intestate succession that are in effect on the date of execution of this document. However, a person born out of wedlock to a natural parent shall not be considered a child of that person unless the person lived, while a minor, as a regular member of the household of the natural parent or of that parent's parent, sibling, or spouse; or otherwise during minority was both openly acknowledged by such a person to be the child of the parent and was involved with such a person in an active social relationship. Further, an adopted child shall not be considered the child of an adopting parent unless the adopted person lived while a minor (either before or after adoption) as a regular member of the household of the adopting parent.

7.5. *Distribution Powers.* For purposes of making distributions, the trustee's powers include the following:

7.5.1. *Nonprorata Distributions*. When the trustee must divide any trust property into parts or shares for the purpose of distribution or otherwise, the trustee may, in the trustee's discretion, make the division and distribution in undivided interests, in kind, or partly in kind and partly in money, prorata or nonprorata. The trustee may make sales of the trust property that the trustee considers appropriate to accommodate such distributions.

7.5.2. *Nonprorata Division of Community Property.* Community property and quasi-community property may be divided on the basis of a nonprorata division of the aggregate value of the property, or on the basis of a division of each individual item or asset, or partly on each basis.

7.5.3. *Power to Delay Distributions.* When an event occurs on which the trustee is required to divide or distribute trust property, the trustee may delay the division or distribution of all or part of the property for the period of time necessary to ascertain and provide for the payment of any tax claim or other liability, contingent or otherwise, against the trust property. During this period, the trustee may pay the net income of the trust to the beneficiaries entitled to it, and any income not distributed shall on resolution of any tax claim or other liability be payable to the person entitled to it immediately after the trustee receives the income. This provision shall not be deemed to postpone or defer the vesting of any interest created by the dispositive clauses of the trust. Nor does this provision authorize a delay in any distribution that might result in a transfer's losing eligibility for a federal estate tax marital deduction or charitable deduction.

7.6. *Limitations on Discretionary Distributions to a Trustee*. A person who is a beneficiary of a trust that permits the person, as trustee or cotrustee, to make discretionary distributions of income or principal to or for the benefit of him- or herself may exercise that power in his or her favor only for health, education, maintenance, or support within the meaning of Internal Revenue Code §§2041, 2514. Despite the foregoing and California Probate Code §15620, if a power to make discretionary distributions of income or principal is conferred on two or more trustees, the power may be exercised by any trustee who is not a current permissible beneficiary of that power; and, as long as there is no trustee who is not a current permissible beneficiary of that power, any party in interest may apply to a court of competent jurisdiction to appoint a trustee who is not a current permissible beneficiary of that power, and the power may be exercised by the trustee appointed by the court. The restrictions of this paragraph do not apply to a person making distributions of property that the person could withdraw by exercising that person's own power of revocation.

7.7. *Prohibition Against Discharge of Support Obligation*. No one may exercise, alone or with others, a discretionary power conferred by this document in a manner that results in the discharge of that person's obligation to support another person. This prohibition applies to both personal powers and fiduciary powers. These restrictions do not apply to a person making distributions of property that the person could withdraw by exercising his or her power of revocation.

7.8. ***Apportionment of Taxes*****. Except as otherwise provided in this document, all estate, generation-skipping, and inheritance taxes, including interest and penalties, imposed on or by reason of the inclusion of any trust property in the gross taxable estate of either settlor may be paid by the trustee and charged to, prorated among, or recovered from the trust property or the persons entitled to the benefits under the trust as provided in the California Probate Code and the Internal Revenue Code.**

7.9. ***Transfer Taxes Caused by Disclaimer.*** **Any increase in estate, generation-skipping, or inheritance taxes, including interest and penalties, resulting from a qualified disclaimer shall be paid from the disclaimed property.**

ARTICLE 8
DEBTS

8.1. ***Debts of Deceased Settlor and Estate*****. On the death of the Deceased Settlor, the trustee may pay from the trust property:**

8.1.1. ***Funeral and Last Illness Expenses*****. The Deceased Settlor's funeral and last illness expenses;**

8.1.2. ***Other Debts*****. Debts of the Deceased Settlor, the Surviving Settlor, or both, that would be properly payable by the Deceased Settlor's probate estate if the trust property were included in the probate estate and a timely creditor's claim was filed.**

8.1.3. ***Probate Expenses*****. Necessary and proper expenses of administration of the Deceased Settlor's probate estate.**

8.2. ***Allocation Between Deceased Settlor and Surviving Settlor*****. Payments made for the purposes described in Paragraph A shall be allocated and charged to the separate and community property of each settlor as provided by California law, including Probate Code §§19320-19326, and the trustee shall take any action necessary to recover from the Surviving Settlor or the Survivor's Trust amounts paid that are chargeable to the Surviving Settlor's property. Funeral and last illness expenses shall be allocated and charged to property included in the gross estate of the Deceased Settlor for federal estate tax purposes to the extent possible.**

8.3. ***Debts of Surviving Settlor and Estate*****. On the death of the Surviving Settlor, the trustee may pay from the property of the Survivor's Trust:**

8.3.1. ***Funeral and Last Illness Expenses*****. The Surviving Settlor's funeral and last illness expenses.**

8.3.2. ***Other Debts*****. Debts of the Surviving Settlor that would be properly payable by the Surviving Settlor's probate estate if the trust property were included in the Surviving Settlor's probate estate and a timely creditor's claim was filed.**

8.3.3. ***Probate Expenses*****. Necessary and proper expenses of administration of the Surviving Settlor's probate estate.**

8.4. ***Limitations on Sources of Payment*****. Despite the provisions in Paragraphs 8.1, 8.2, and 8.3, the trustee shall not pay any estate or inheritance taxes (including interest or penalties), last illness and funeral expenses, attorney fees, administration expenses, debts, or other obligations of the settlor or the settlor's estate, from any retirement plan (including an Individual Retirement Account) benefits in which the trust acquires an interest as a result of the settlor's death. Further, the trustee shall not pay any such obligation from any life insurance or other property passing to the trust on the settlor's death in accordance with a beneficiary designation unless the property would have been liable for the obligation had the property passed to an individual beneficiary rather than the trust.**

ARTICLE 9
OFFICE OF TRUSTEE

9.1. ***Definition of Trustee.*** **The term "trustee" as used in this document usually refers to such one or more persons or entities who, alone or in combination, have the power to take action on behalf of the trust, but it may instead refer to any form of limited power or special trustee or one or more individual cotrustees,**

depending on context.

9.2. *Scope of Trustee Provisions.* Except as otherwise provided, the provisions of this document concerning trustee duties, powers, privileges, and protections from liability, apply to all trustees, including successor trustees, of all trusts established by this document.

9.3. *Resignation of Trustee.* The trustee may resign at any time by mailing notice to the persons entitled by law to receive a trustee's account. Unless circumstances are such that it is not necessary to replace the resigning trustee, the resignation becomes effective on the acceptance of office by the successor trustee who replaces the resigning trustee.

A trustee shall be deemed to have resigned in the event of such trustee's incapacity. For purposes of this instrument, a trustee's incapacity shall be deemed to exist when the trustee's incapacity has been declared by a court of competent jurisdiction or when a conservator for such Trustee has been appointed, or upon mailed notice to the persons entitled by law to receive a trustee's account of certificates executed by two (2) physicians licensed to practice in the state of such trustee's residence which state the physicians' opinion that the trustee is physically or mentally incapable of managing his or her financial affairs. The effective date of such incapacity shall be the date of the decree adjudicating the incapacity, of the decree appointing the conservator, or of delivery of the physicians' certificates, as the case may be.

9.4. *Removal of Any Trustee.* Any trustee, including a settlor, may be removed in accordance with California law.

9.4.1. *Removal of Corporate Trustee.* The current income beneficiary (or a legal representative of that beneficiary) of a trust created under this document may remove a current corporate trustee and substitute a successor corporate trustee if the beneficiary or representative reasonably believes that substitution will result in a significant reduction in trustee fees.

9.5. *Power to Name Successor Trustee.* A trustee of this trust shall have the power to name a person or entity who shall become that trustee's successor if a successor is required and this document makes no other provision for a successor, or if the successors named in this document are not willing to act. The power shall be exercised as provided in this document for the exercise of a power of appointment.

9.6. *Applicable Rules for Cotrustees.* The following rules apply when a trust has more than one trustee, none of whom have the power to revoke the trust:

9.6.1. *Lack of Unanimity.* Cotrustees who are unable to reach a unanimous decision may act by majority decision.

9.6.2. *Vacancy.* If a vacancy occurs in a cotrusteeship, the remaining cotrustees may act for the trust.

9.6.3. *Disqualified Trustees.* If one or more trustees cannot participate in a decision concerning a discretionary distribution, the decision shall be made in accordance with the provisions of this document expressly addressing that circumstance.

9.6.4. *Temporary Disability.* If a cotrustee is unavailable to perform duties because of absence, illness, disqualification under other law, or other temporary incapacity, and prompt action is necessary to achieve the purposes of the trust or to avoid injury to the trust property, the remaining cotrustee or a majority of the remaining cotrustees may act for the trust.

9.6.5. *Delegation of Authority.* A trustee may not delegate to a cotrustee the performance of a function the settlor reasonably expected the trustees to perform jointly.

9.7. *Compensation of Trustees.* Trustees are entitled to reasonable compensation.

ARTICLE 10
TRUSTEE POWERS

10.1. *General Powers of Trustee*. Subject to any limitations expressly stated in this document, the trustee of each trust established under this document is authorized to exercise the following powers for purposes of

discharging the trustee duties imposed by this document and by law:

10.1.1. *California Law.* The powers conferred on trustees by California law in the absence of a limitation in the trust instrument. These powers shall be deemed to include the power to invest in any kind of property without regard to statutory limitations, insurance, or collateralization requirements otherwise applicable, and the power to operate or participate in any business without complying with any otherwise applicable requirement for a court order.

10.1.2. *Prudent Person*. The power to perform any act that a prudent person would take in order to accomplish the objectives of the trust.

10.1.3. *Prudent Investor.* The power to perform any act that a prudent investor would take in investing trust property.

10.1.4. *Owner of Property.* The power to exercise any right or privilege that an unmarried competent adult has over individually owned property.

10.1.5. *Other Powers.* Any other powers appropriate to achieve the proper investment, management, and distribution of the trust property.

10.1.6. *Uniform Trust Code*. Any other powers conferred by the Uniform Trust Code, as revised and amended in 2001 by the National Conference of Commissioners on Uniform State Laws.

10.2. *Specific Powers of Trustee*. The powers listed in the previous paragraph include, but are not limited to, those described in this paragraph. The trustee may:

10.2.1. Acquire or sell property, for cash or on credit, at public or private sale;

10.2.2. Borrow money, with or without security, and mortgage or pledge trust property for a period within or extending beyond the duration of the trust;

10.2.3. Abandon or decline to administer property of no value or of insufficient value to justify its collection or continued administration;

10.2.4. Make loans from trust property, including loans to a beneficiary on terms and conditions the trustee considers to be fair and reasonable under the circumstances, including imposition of a lien on future distributions for purposes of securing repayment of a loan;

10.2.5. Pledge trust property to guarantee loans made by others to the beneficiary;

10.2.6. Combine two or more trusts into a single trust or divide a trust into two or more separate trusts;

10.2.7. Appoint any person to be an authorized signer (either alone or with others, jointly or severally) for any financial institution account or securities account.

ARTICLE 11
TRUSTEE DUTIES, LIMITATIONS ON DUTIES, EXCULPATION

11.1. *Duties of Trustee*. Except as expressly provided in this document, the trustee has the duties imposed by law, including the duty to report and account to trust beneficiaries, statutory duties to give notice and copies of this document to trust beneficiaries and heirs at law on the death of a settlor, and the duty to invest property in accordance with the Uniform Prudent Investor Act.

11.2. *Limitations on Trustee's Duty of Loyalty.* As long as the trustee does not act in bad faith or in disregard of the purposes of the trust, it is not a breach of the trust for the trustee to take any of the following actions:

11.2.1. Lend the trustee's own funds to the trust for any trust purpose, with interest at current rates;

11.2.2. Receive reasonable security for such a loan;

11.2.3. Purchase trust property from the trust at fair market value, provided the purchase price is paid in full in advance;

11.2.4. Lease or sell the trustee's own property to the trust at a rent or price not in excess of its fair market value;

11.2.5. Employ the trustee, a relative of the trustee, or a business in which the trustee has an interest, to perform needed services for the trust or any business in which the trust has an interest and to pay compensation not exceeding fair market value;

11.2.6. Acquire or retain an interest in property in which the trust also has an interest;

11.2.7. Acquire or retain stock of a corporate trustee or an affiliate of a corporate trustee unless the acquisition or retention would violate the trustee's duties in the case of stock of a similar corporation other than the trustee or its affiliate;

11.2.8. Deposit funds in a bank in which the trustee has an interest;

11.2.9. Perform as trustee any action described above with a relative of the trustee or a business in which the trustee has an interest;

11.2.10. Hold property of multiple trusts without segregating or dividing the property and without separately titling the property of each trust, but instead keeping accounts sufficient to identify the property of each trust.

11.3. *Acceptance of Additions*. The trustee has a duty to accept additions to this trust unless an addition would significantly expand the trustee's duties, the transferred property is hazardous or otherwise creates a substantial increased risk of trustee liability, or the property is transferred by a competent person other than a settlor who retains the capacity to establish a trust naming a different trustee. If an addition is rejected on the ground of increased duties or liabilities and the transferor is deceased or lacks capacity, the trustee shall give reasonable notice to the persons interested in the trust.

11.4. *Exculpation of Trustee.* A trustee of any kind nominated by this document, otherwise designated by a settlor, or designated as authorized in this document, shall not be liable to any beneficiary for the trustee's acts or omissions, except in cases of willful misconduct, bad faith, or gross negligence. The previous sentence does not relieve a trustee of any obligation to restore to the trust any benefits received by the trustee as a result of a breach of the trust. This paragraph does not apply to a person who regularly engages in the business of acting as a trustee.

11.5. *Cotrustee's Duty to Act*. A cotrustee must participate in the performance of a trustee's function unless the cotrustee is unavailable to perform the function because of absence, illness, disqualification under other law, or other temporary incapacity or unless the cotrustee has properly delegated the performance of the function to another trustee.

11.6. *Limitation on Duty to Investigate Predecessor or Cotrustee*. A successor trustee or cotrustee has no duty to audit or investigate the administration or accounts of any prior trustee or cotrustee unless an audit or investigation is demanded in writing by a beneficiary. Each trustee shall exercise reasonable care to (1) prevent a cotrustee from committing a serious breach of trust, and (2) compel a cotrustee to redress a serious breach of trust.

ARTICLE 12
RULES OF CONSTRUCTION

12.1. *Applicable Law.* This document shall be construed in accordance with the laws of the State of California.

12.2. *Context.* The divisions, paragraphs, and subparagraphs of this document shall be construed in context, giving due regard to the headings and the topic of discussion.

12.3. *Survivorship Requirements.* All references in this trust to a beneficiary surviving the Settlor(s) shall be interpreted to require that the beneficiary survive for thirty (30) days. If the beneficiary does not survive for thirty (30) days, for all purposes of this Trust the person shall be considered to have died before the Settlor(s).

ARTICLE 13
MISCELLANEOUS

13.1. *Property Retains Character*. Except as expressly provided in this document, all property becoming subject to this trust shall retain its character as community property, quasi-community property, or separate property after becoming trust property.

13.2. *Exception: Joint Tenancy Property*. No property now or hereafter subject to this trust is joint tenancy property or community property with right of survivorship. The parties agree that any property that was held as joint tenancy property or community property with right of survivorship before becoming trust property was and shall remain community property.

13.3. *Spendthrift Clause*. The interests of the beneficiaries in the income and principal of the trusts created by this document are not subject to voluntary or involuntary transfer.

13.4. *Rule Against Perpetuities*. Unless terminated earlier in accordance with other provisions of this document, each trust created by this document or by exercise of any power of appointment conferred by this document (unless an appointed trust is entitled to a new perpetuities period) shall terminate 21 years after the death of the last survivor among Surviving Settlor and those of our issue living on the date of the death of the Deceased Settlor. In the event of termination under this paragraph, the principal and undistributed income of a terminated trust shall be distributed to the then income beneficiaries of that trust in the same proportion that the beneficiaries are entitled to receive income when the trust terminates. If at the time of such termination the rights to income are not fixed by the terms of the trust, distribution under this clause shall be made to the persons who are then entitled or authorized, in the trustee's discretion, to receive trust payments.

ARTICLE 14
REVOCATION, AMENDMENT, AND EXERCISE OF APPOINTMENT POWERS

14.1. *Trust Irrevocable Except as Provided*. Except as provided in this division, all trusts created by this document are irrevocable and cannot be amended.

14.1.1. *Exception: Revocable While Both Settlors Are Living*. During the joint lifetimes of the settlors, either settlor may revoke all trusts created by this document, with respect to both halves of the community property and the revoking settlor's own separate property. The revocation must satisfy the procedural requirements of this division for amending or revoking trusts. On revocation, community property subject to the revocation shall be delivered to both settlors or as the settlor(s) direct, except that the property shall be delivered to the competent settlor if only one is competent. Separate property trust assets of each settlor joining in the revocation shall be delivered to the settlor owning the property. A unilateral revocation of the trust by one settlor does not prevent reestablishment of the trust with respect to any property that may later pass to the trust under the will of a settlor or otherwise.

14.1.2. *Exception: Amendment While Both Settlors Are Living*. During the joint lifetimes of the settlors, all trusts created by this document may be amended by mutual agreement of the settlors. Any amendments must satisfy the procedural requirements of this division for amending or revoking trusts.

14.1.3. *Exception: Revocation or Amendment of Survivor's Trust*. The Survivor's Trust may be revoked or amended, in whole or in part, at any time by the Surviving Settlor. Any such revocation or amendment must satisfy the procedural requirement of this division for amending or revoking trusts. On revocation, the trustee shall deliver the trust property to the Surviving Settlor.

14.2. *Procedural Requirements for Amending or Revoking Trusts*. No amendment or revocation of any trust shall be effective unless all of the following requirements are satisfied:

14.2.1. *Signed Written Document*. The amendment or revocation must be accomplished by a written document signed by the settlor(s) taking the action. Despite the previous sentence, a settlor's power to revoke or amend may be exercised by an attorney-in-fact if and to the extent the document appointing the attorney-in-

fact expressly so authorizes with an express reference to this trust.

14.2.2. *Acknowledgment or Attorney Certificate*. Except in the case of a document executed in accordance with a court order: (a) the document must be personally acknowledged before a notary public by the person(s) signing the document (not a witness); or (b) the document must contain a statement, signed by an attorney-at-law before or at the time the document is signed by the person(s) taking the action, which declares that the attorney-at-law represents the settlor(s) taking the action and approves the form of the document.

14.2.3. *Delivery to the Trustee*. In the case of an action not requiring the consent of both settlors, the document must be delivered during the lifetime of the settlor taking the action to: (a) Each then acting trustee of the trust who is not a settlor taking the action; and (b) each settlor then living and competent but not joining in the action. In the case of an action requiring the joint action of both settlors, the document must be delivered during the settlors' joint lifetimes to each acting trustee who is not a settlor taking the action.

14.3. *Effect of Defective Documents*. The procedural requirements of this division for revoking or amending trusts are intended to prevent fraud, reduce the risk of undue influence, and provide certainty with respect to the intentions of the settlors. A court, in order to give effect to the actual intentions of a settlor, may give effect to a document not satisfying all procedural requirements for revoking or amending a trust if the court finds that: (1) The settlor taking the action was competent; (2) the attempted revocation or amendment was not the result of fraud, undue influence, or duress; (3) the document was clearly intended to amend or revoke the trust; and (4) there is no reason to deny equitable relief. The proponent of the document shall have the burden of proof. The standard of proof as to these matters shall be: (1) Preponderance of the evidence as to amendments having no or only incidental impact on distribution of the trust after the settlor's death; and (2) clear and convincing evidence in the case of changes that substantially affect distribution of a trust.

14.4. *Revocation by Gift.* The procedural requirements of this division for revoking or amending trusts do not apply to gifts of trust property made by one or both settlors that would be valid if the gifted property was not subject to this trust. Any such gift revokes the trust as to the gifted property.

14.5. *Effect of Amendment Not Acceptable to Trustee*. The consent of the trustee is not required for a valid amendment. In the event a trust amendment substantially increases the duties or liabilities of the trustee or changes the trustee's compensation without the trustee's consent, the trustee shall have the right to resign.

14.6. *Limitation on Exercise of Powers by Conservator or Guardian of Estate*. No conservator or guardian of a settlor's estate shall have any power to amend or revoke this trust or exercise any power of appointment. The previous sentence does not apply if the conservator or guardian is acting under a court order made in compliance with a "substituted judgment" statute. Until such an order is made, no conservator or guardian shall be deemed to hold such a power for any purpose.

14.7. *Exercise of Powers of Appointment*. A power of appointment conferred by this document, other than a power held in a fiduciary capacity by a trustee, may be exercised only by an instrument that specifically refers to both this trust and the specific power being exercised. Such a power must be exercised by will, codicil, or a "qualified lifetime instrument." For purposes of this paragraph, a qualified lifetime instrument is an instrument meeting the requirements described above for revoking a trust as to the revoking settlor's separate property, including an instrument executed by a conservator or an attorney-in-fact. A court may give effect to an attempted exercise that fails to satisfy the requirements of this paragraph in accordance with the criteria that would apply to a defective amendment of this document. It being a purpose of this trust to avoid probate, the trustee may distribute trust property in accordance with a will or codicil that has not been probated.

Executed at _ _[*city*]_ _, California, on _ _[*date*]_ _.

__[*Signature of settlor*]__
Harold Older,
Settlor and Trustee

__[*Signature of settlor*]__
Wendy Older,
Settlor and Trustee

State of California)

)
County of _ _[*name*]_ _)
_____)

On _ _[*date*]_ _, before me, _ _[*name of notary*]_ _, a Notary Public in and for said State, personally appeared Harold Older and Wendy Older, personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is/are subscribed to the within instrument, and acknowledged to me that he/she/they executed the instrument in his/her/their authorized capacit(y/ies) and that by his/her/their signature(s) on the instrument the person(s), or the entity on behalf of which the person(s) 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.

__[*Signature*]__

THE HAROLD AND WENDY OLDER REVOCABLE TRUST

Exhibit A

Initial Trust Property

The initial trust estate consists of all right, title, and interest of the settlors or either of them in or to any and all of the following property.

1. The residence commonly known as 123 Main Street, Sacramento, California.

2. The contents of that residence.

3. All other real property.

4. All bank, stock brokerage, and other financial and securities accounts of any kind.

5. All stocks, bonds, and other securities of any kind.

6. All intangible property, including any indebtedness of any person or entity.

7. Clothing, jewelry, personal effects, vehicles, boats, and all other tangible personal property.

8. Interest in XYZ Corporation (friend's closely held company, a startup).

9. All other assets of whatever kind or character and wherever located.

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Source: Estate Planning/Complete Plans for Small and Mid-Size Estates/11A Plan for Married Couple With Adult Children/§11A.36 B. Form: Grant Deed

§11A.36 B. Form: Grant Deed

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11A.36-1 Grant deed

RECORDING REQUESTED BY:

AND WHEN RECORDED MAIL TO:

Harold and Wendy Older, Trustees

123 Main Street

Sacramento, CA 95828

MAIL TAX STATEMENTS TO:
Same as above

_____

SPACE ABOVE THIS LINE FOR RECORDER'S USE

Documentary Transfer Tax is -0-. TRANSFER IS TO A REVOCABLE TRUST FOR GRANTORS' BENEFIT AND NOT PURSUANT TO A SALE. Rev & T C §11930.

Signature of Declarants: _____

GRANT DEED

FOR VALUABLE CONSIDERATION, receipt of which is hereby acknowledged, HAROLD OLDER and WENDY OLDER, husband and wife, as joint tenants ("Grantors"), hereby GRANT to: HAROLD OLDER and WENDY OLDER, Cotrustees of The Harold and Wendy Older Living Trust under declaration dated _ _[*date*]_ _ ("Grantee") all that certain real property situated in the City of Sacramento, County of Sacramento, State of California, more particularly described as follows:

SEE LEGAL DESCRIPTION ATTACHED HERETO AS EXHIBIT A AND INCORPORATED HEREIN.

Commonly known as: 123 Main Street, Sacramento, California 95825

A.P.N.: 123-45-6789

The undersigned Grantors declare that, notwithstanding the manner in which they took title to the subject property, it has been and continues to be their intention that the property is owned by them as their community property. The Grantors further declare that the within transfer to The Harold and Wendy Older Living Trust shall not affect the community property character of the property.

Date: _____ **_____**
HAROLD OLDER

Date:_____ **_____**
WENDY OLDER

[*Acknowledgments; for form see §9.38*]

Comment: Exhibit A containing the complete legal description of the property should be attached. Both signatures must be notarized.

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Source: Estate Planning/Complete Plans for Small and Mid-Size Estates/11A Plan for Married Couple With Adult Children/§11A.37 C. Form: General Assignment to Revocable Trust

§11A.37 C. Form: General Assignment to Revocable Trust

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NOTE: For discussion of assignments to a trust and alternative sample forms, see chap 12.

11A.37-1 General assignment to revocable trust

ASSIGNMENT TO HAROLD AND WENDY OLDER REVOCABLE TRUST

1. The undersigned own various assets and properties.

2. The undersigned hereby assign, grant, transfer, convey, bargain and sell to the Trustee of the HAROLD AND WENDY OLDER REVOCABLE TRUST executed earlier this day (the "Trust"), all of his, her, and their right, title and interest in the following assets:

2.1. All furniture, furnishings, fixtures, and other tangible personal property;

2.2. The real property commonly known as 123 Main Street, Sacramento, CA 95828;

2.3. Any and all bank and/or brokerage accounts; and

2.4. All his, her or their other assets of every kind and description and wherever located whether real or personal, tangible or intangible, choate or inchoate, including, without limitation, cash or cash equivalents.

IN WITNESS WHEREOF, this General Assignment is executed by the undersigned as of _____, 2008.

Date: _ _ _ _ _ _ __[*Signature*]__
HAROLD OLDER, Settlor

Date: _ _ _ _ _ _ __[*Signature*]__
WENDY OLDER, Settlor

[*Acknowledgments; for form see §9.38*]

Comment: Both signatures must be notarized. Some practitioners have clients assign all (or substantially all) assets to the trust so that a *Heggstad* petition (Prob C §850(a)(3)) can be used to capture any overlooked items. See *Estate of Heggstad* (1993) 16 CA4th 943, 948, 20 CR2d 433. See §12.37.

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Source: Estate Planning/Complete Plans for Small and Mid-Size Estates/11A Plan for Married Couple With Adult Children/§11A.38 D. Form: Wills of Harold Older and Wendy Older

§11A.38 D. Form: Wills of Harold Older and Wendy Older

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WARNING: This form is a sample based on the hypothetical in this chapter only. It has been modified to follow the format of the wills in California Will Drafting (3d ed Cal CEB 1992). The drafter should refer to the text of Will Drafting before preparing any document.

NOTE: The pourover wills of Harold and Wendy will be drafted as mirrors of each other.

WILL OF _ _[*HAROLD/WENDY*]_ _ OLDER

I, _ _[*Harold/Wendy*]_ _ Older, a resident of Sacramento County, California, declare that this is my will.

ARTICLE 1
INTRODUCTION

1.1. *Revocation.* I revoke all wills and codicils that I have previously made.

1.2. *Spouse.* I am married to _ _[*Wendy/Harold*]_ _ Older, who is hereafter referred to as "my spouse."

1.3. *Children and Issue*. The names and birth dates of my children are: David Older, December 31, 1973; Catherine Older, December 1, 1975; Beatrice Older, August 1, 1978; and Aaron Older, February 2, 1982. I have no deceased children. All references in this will to my "children" are to the children just named and no others, except that the term shall also include any child or children hereafter born to or adopted by me. All references in this will to my "issue" are to my children as so defined and their issue.

1.4. *No Contract to Make Wills*. I have not entered into any contract to make this will, and any similarity of the provisions of this will to the provisions of a will of my spouse shall not be construed as evidence of such a contract.

ARTICLE 2
DISPOSITION OF PROPERTY

2.1. *Confirmation of Spouse's Community Interest*. I confirm to my spouse my spouse's interest in our community property. I intend by this will to dispose of all my separate property (including all quasi-community property as described in the California Probate Code) and of my one-half (1/2) interest in our community property.

2.2. *No Exercise of Powers*. Except as may be specifically provided herein, I refrain from exercising any testamentary power of appointment I may have at the time of my death.

2.3. *Gift to Trust*. I give all of my estate to the trustee then in office of the trust identified below, to be held and administered by the trustee according to the terms and conditions of that trust including, without limitation, any amendment made to it before my death:

Trust: Harold and Wendy Older Revocable Trust under declaration of trust dated _ _[*date*]_ _

2.4. *Alternate Disposition*. If for any reason the foregoing disposition by pourover into existing trust is not operative or is invalid for any reason, or if the Harold and Wendy Older Revocable Trust is or has been revoked, then I hereby incorporate by reference the terms of that trust, as executed earlier on the date hereof, without giving effect to any amendments made subsequently, and I give the residue of my estate to the trustee named in the trust as trustee, to be held, administered, and distributed as provided in that instrument.

2.5. *Survivorship Requirements.* Any references in this will to a beneficiary surviving me shall be interpreted to require that the beneficiary survive for thirty (30) days. If the beneficiary does not survive for thirty (30) days, for all purposes of this will the person shall be considered to have died before me.

ARTICLE 3
EXECUTORS

3.1. *Nomination of Executors.* I nominate the persons listed below, in the order and priority indicated, as executor and alternate or successor executor of my will:

First: _ _[*Wendy/Harold*]_ _ Older
Second: Catherine Older
Third: David Older

I request that no bond be required of any executor nominated in my will.

3.2. *Power to Sell or Lease Estate Property*. My executor may sell or lease, with or without notice, at either public or private sale, for cash or terms, any property of my estate that my executor considers necessary for the estate's proper administration and distribution.

3.3. *Nonprorata Distributions*. When making any division or distribution of property, the executor may, in the executor's discretion, make the division and distribution in undivided interests, in kind, or partly in kind and partly in money, prorata or nonprorata. The executor may make sales of the estate property that the executor considers necessary to accommodate such distributions.

3.4. *Powers of Independent Administration.* My Executor may administer my estate under the California Independent Administration of Estates Act (Probate Code §§10400-10592).

Signed on _ _[*date*]_ _ , at Sacramento, California.

_____
_ _[*HENRY/WENDY*]_ _ OLDER

On the date written below, the testator, _ _[*Harold/Wendy*]_ _ Older, declared to us that this instrument, consisting of _ _[*number*]_ _ pages including this page, was the testator's will and asked us to witness it. The testator then signed this will in our presence, all of us being present at the same time. At the testator's request, in the testator's presence, and in the presence of one another, we subscribe our names as witnesses.

We declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on _ _[*date*]_ _, at Sacramento, California.

__[*Signature of witness*]__	__[*Signature of witness*]__
_ _[*Typed name*]_ _	_ _[*Typed name*]_ _
_ _[*Address*]_ _	_ _[*Address*]_ _

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Source: Estate Planning/Complete Plans for Small and Mid-Size Estates/11A Plan for Married Couple With Adult Children/§11A.39 E. Form: Attorney-Drafted Durable Powers of Attorney

§11A.39 E. Form: Attorney-Drafted Durable Powers of Attorney

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WARNING: This form is a sample based on the hypothetical in this chapter. The drafter should refer to the text of California Powers of Attorney and Health Care Directives (Cal CEB 2008) before preparing a durable power of attorney. For financial management and personal care issues and forms and for nomination of conservator, see Powers of Attorney, chaps 4-6.

NOTE: The durable powers of attorney of Harold and Wendy will be drafted as mirrors of each other.

11A.39-1 Attorney-drafted durable powers of attorney

I, _ _[*HAROLD/WENDY*]_ _ Older, a resident of Sacramento County, California, declare:

ARTICLE 1: DECLARATIONS

1.1. This durable power of attorney is executed on _____, 2008.

1.2. My name and address are: _ _[*HAROLD/WENDY*]_ _ OLDER, 123 Main Street, Sacramento, CA.

1.3. The name and address of my Agent are: _ _[*WENDY/HAROLD*]_ _ OLDER, 123 Main Street, Sacramento, CA. If _ _[*WENDY/HAROLD*]_ _ OLDER fails or ceases to serve as my Agent, then the following persons, one at a time and in the order named, shall serve as successor Agent:

CATHERINE OLDER, _____ [ADDRESS]

DAVID OLDER, _____ [ADDRESS]

1.4. Commencement and Duration of Authority of Attorney-in-Fact. The rights, powers and authorities of _ _[*WENDY/HAROLD*]_ _ OLDER as my Agent hereunder SHALL COMMENCE IMMEDIATELY AND SHALL NOT BE AFFECTED BY MY SUBSEQUENT INCAPACITY. The rights, powers and authorities of CATHERINE OLDER, DAVID OLDER or any other successor Agent hereunder SHALL BECOME EFFECTIVE ON MY INCAPACITY and shall remain in full force and effect thereafter until I regain my capacity. Determination of my incapacity or my regaining capacity shall be as provided in section 1.5 below.

1.5. Determination of Incapacity and Capacity. For purposes of this instrument, a person's incapacity shall be deemed to exist when the person's incapacity has been declared by a court of competent jurisdiction, or when a conservator for such person has been appointed, or on presentation of a certificate executed by two (2) physicians licensed to practice in the state of such person's residence which states the physicians' opinion that the person is physically or mentally incapable of managing his or her financial affairs. The effective date of such incapacity shall be the date of the decree adjudicating the incapacity, the date of the decree appointing the conservator, or the date of the physicians' certificate, as the case may be. A certified copy of the decree declaring incapacity or appointing a conservator, or the physicians' certificate, shall be attached to the original of this instrument and recorded in the same county or counties as the original if the original is recorded.

A person shall be deemed to have regained capacity if there is a finding to that effect by a court of competent jurisdiction, or when a conservatorship for such person has been judicially terminated, or on presentation of a certificate executed by two (2) physicians licensed to practice in the state of such person's residence which states the physicians' opinion that the person is physically and mentally capable of managing his or her financial affairs. A certified copy of the decree declaring such person's capacity or terminating the conservatorship, or the physicians' certificate, shall be attached to the original of this instrument and recorded in the same county or counties as the original if the original is recorded.

I hereby voluntarily waive any physician-patient privilege or psychiatrist-patient privilege that may exist in my favor and I authorize physicians to examine me and disclose my physical or mental condition in order to determine my incapacity or capacity for purposes of this instrument.

ARTICLE 2: POWERS OF THE AGENT

Except as otherwise provided in Article 3, I hereby grant to my Agent hereunder the following powers:

2.1. To deposit in and draw on any accounts that I may have in banks, savings and loan associations, securities brokerages, and other financial institutions; and to establish and terminate all such accounts.

2.2. To collect and deposit for my benefit all interest, dividends, or other payments that may be due to me; to demand, arbitrate, and pursue litigation on my behalf concerning all rights and benefits to which I may be entitled; and to compromise, settle, and discharge all such matters as my Agent considers appropriate under the circumstances.

2.3. To collect and deposit for my benefit all retirement and pension benefits and Social Security benefits and to make retirement plan elections and beneficiary designations for me subject to the limitations in Article 3. I designate my Agent as representative payee for my Social Security benefits.

2.4. To transfer my assets to any revocable trust of which I am the Settlor.

2.5. To pay my debts and to adjust and compromise any claims that may be made against me as my Agent considers appropriate under the circumstances.

2.6. To do all things and enter into all transactions necessary to provide for my personal care and to maintain my customary standard of living; to provide suitable living quarters for me; and to hire and compensate household, nursing, and other employees as my Agent considers advisable for my well-being. This shall specifically include, but not be limited to, the authority to procure and pay for clothing, transportation, medicine, medical care, food, and other needs and to make arrangements, enter into contracts, and commit my resources on my behalf with respect to provision of residential care for me in a convalescent hospital, skilled nursing facility, or other alternative residential facility.

2.7. To make gifts, from time to time, outright or in trust, of my cash or any of my other property, whether real or personal, tangible or intangible, to or for the benefit of my descendants, subject to the limitations of Article 3.

2.8. To borrow money on my behalf and encumber any assets in which I have an interest as security.

2.9. To manage my tangible personal property, including but not limited to moving, storing, selling, donating, or otherwise disposing of this property.

2.10. To invest and reinvest my funds in every kind of property, real, personal, or mixed, and every kind of investment, specifically including, but not limited to, corporate obligations of every kind; preferred or common stocks; shares of investment trusts, investment companies, and mutual funds; and mortgage participations, provided that persons of prudence would make such purchases for their own accounts.

2.11. To purchase, sell, invest, reinvest, and generally deal with all stocks, bonds, debentures, warrants, partnership interests, rights, and securities I own; to take any action with respect to such securities that I have the power to take, including but not limited to opening brokerage accounts, buying and selling, voting shares, acquiring or selling options; managing and controlling all partnership interests, including making all decisions I could make as a general partner, limited partner, or both; and executing all documents required of me as such partner.

2.12. To prepare and file all income and other federal and state tax returns that I am required to file; to sign my name on tax returns; to hire preparers and advisers and pay for their services; and to do whatever is necessary to protect my assets from assessments for income taxes and other taxes. My Agent is specifically authorized to receive confidential information; to receive checks in payment of any refund of taxes, penalties, or interest; to execute waivers of restrictions on assessment or collection of tax deficiencies and waivers of notice of disallowance of claims for credit or refund; to execute consents extending the statutory period for

assessment or collection of taxes; to execute closing agreements under Internal Revenue Code §7121, or any successor statute; and to delegate authority or substitute another representative with respect to all above matters.

2.13. To have access to all of my safe deposit boxes; to contract with financial institutions for the maintenance and continuation of safe deposit boxes in my name; to add to and remove the contents of all such safe deposit boxes; and to terminate contracts for all such safe deposit boxes.

2.14. To use any credit cards in my name to make purchases and to sign charge slips on my behalf as may be required to use such credit cards; and to close my charge accounts and terminate my credit cards under circumstances where my Agent considers such acts to be in my best interest.

2.15. To perform, execute, enter into, perform, and terminate any other act, deed, contract, matter, or thing, that in the opinion of my Agent is in the best interest of my estate or ought to be done, executed, or performed in conjunction with this power of attorney, of every kind and nature, as fully and effectively as I could do if personally present. The enumeration of specific items, acts, rights, or powers in this instrument does not limit or restrict the general powers granted to my Agent except where powers are expressly restricted.

2.16. To commence enforcement proceedings, at my expense, against any bank, savings and loan association, or other person or entity that fails or refuses to honor this durable power of attorney.

ARTICLE 3: LIMITATIONS ON AGENT

My Agent shall not have these powers:

3.1. My Agent may only make gifts that result in gifts of equal value as between my living children (or of equal value as between my living grandchildren) and no distribution to a descendant of mine may exceed, in the aggregate from all of my sources, the annual exclusion from gift tax (as defined in Internal Revenue Code §2503(b) or any successor section) in any calendar year.

3.2. My Agent may not change or modify any disposition that I have made of my assets taking effect at my death, including any changes to beneficiary designations of retirement benefits (including IRAs) or life insurance policies.

ARTICLE 4: MISCELLANEOUS

4.1. My heirs, successors, and assigns shall be bound by the acts of the Agent serving pursuant to this durable power of attorney.

4.2. If any provision in this power of attorney is for any reason inapplicable or unenforceable, the remaining provisions shall nevertheless remain in full force and effect.

4.3. For the purpose of inducing any party to act in accordance with the powers granted in this durable power of attorney, I hereby represent, warrant, and agree that I and my heirs, distributees, legal representatives, successors, and assigns will hold such party or parties harmless from any loss suffered, or liability incurred, by such party or parties in acting in accordance with this durable power of attorney prior to that party's receipt of written notice of any termination. Any third party dealing in good faith with my Agent may conclusively rely upon, and need not inquire into, my capacity at the time this durable power of attorney is created, or at the time any action is taken pursuant to this durable power of attorney.

4.4. If it is necessary to have a conservator of my person or estate or both appointed, then I nominate _ _[*WENDY/HAROLD*]_ _ OLDER as conservator of my person and estate. If she/he for any reason cannot or does not serve, I nominate Catherine Older, and then David Older, in that order of priority, as conservator of my person and estate. I direct that such conservator shall serve without bond or with the minimum possible amount of bond. I hereby revoke any and all prior nominations of conservators previously executed by me.

Date: _ _[*date*]_ _ _____

_ _[*HAROLD/WENDY*]_ _ **OLDER**

[*Acknowledgment; for form see §9.38*]

Comment: Some practitioners provide the principal, and in some cases the agent, with copies of the Probate Code sections that describe the powers identified with the terms used in the uniform durable power of attorney form. See Prob C §§4400-4465.

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12

Completing and Implementing the Estate Plan

Carolyn E. Henel
Anne Bruner Nash

I. COMPLETING THE PLAN
- A. Mailing Draft Documents to Client §12.1
- B. Obstacles to Completing the Plan
  - 1. When Client Does Not Respond After Receiving Drafts §12.2
    - a. Form: 3-Month Reminder Letter §12.3
    - b. Form: 6-Month Reminder Letter §12.4
    - c. Form: 1-Year Letter §12.5
  - 2. Working With Client Who Is Seriously Ill §12.6
  - 3. When Estate Plan Must Be Executed Outside of Office §12.7
  - 4. Working With Client Who Cannot Complete the Estate Plan §12.8
  - 5. When Important New Facts Come to Light After Drafts Completed §12.9

II. HANDLING THE DOCUMENTS AFTER SIGNING §12.10
- A. Custody of Original Documents §12.11
  - 1. Documents in Custody of Client
    - a. In Client's Home §12.12
    - b. Safe Deposit Box §12.13
  - 2. Documents in Custody of Attorney §12.14
  - 3. Documents in Custody of Corporate Fiduciary §12.15
- B. Copies
  - 1. Copies for Attorney and Client §12.16
  - 2. Copies for Fiduciaries §12.17
  - 3. Copies for Beneficiaries §12.18
- C. Destruction of Previous Documents §12.19

III. IMPLEMENTING THE PLAN §12.20
- A. Trust Funding
  - 1. Purpose of Funding §12.21
  - 2. Division of Responsibilities Between Attorney and Client §12.22
    - a. Funding Memorandum to Client §12.23
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I. COMPLETING THE PLAN

§12.1 A. Mailing Draft Documents to Client

Once the attorney has completed drafts of the estate planning documents, they are mailed to the client with a cover letter. Practice varies in what is included in the letter and how the attorney proceeds once the drafts are mailed. Some attorneys include in the letter a summary of the estate planning documents, including the dispositive provisions of the will or trust and what will happen to the assets not governed by these documents, and a review of all persons who have been named as fiduciaries in the various documents, summarizing their responsibilities and noting the assets for which they will be responsible. The letter usually asks the client to contact the attorney's office if there are mistakes in the documents or if the client has questions or wishes to make changes. Some attorneys ask that the client review the documents, note corrections, questions, or changes on the drafts, and make an appointment so that the attorney can review the documents with the client in person.

In each of the chapters setting out estate planning for a hypothetical client, the author has concluded the chapter with a letter to the client to send with the drafts. These letters reflect the variety of practice among attorneys.

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B. Obstacles to Completing the Plan

§12.2 1. When Client Does Not Respond After Receiving Drafts

Clients sometimes fail to contact the attorney after the attorney sends out drafts of the estate planning documents. The duty of competence imposed by Cal Rules of Prof Cond 3-110(B) includes the attorney's duty to act with diligence, so it is important to maintain a calendar system for reminding clients of the need to complete their estate planning.

The attorney should calendar a date by which the client should respond to the draft documents. If the client has not responded by that date, the attorney should follow up by sending a letter to the client noting the lack of response and stating that unless the documents are properly executed, the client's estate plan is not effective and the client's intentions may be thwarted. If a revocable trust is part of the plan, the letter should also point out that transfer documents must be executed to fund the trust. It may be helpful to remind the client that if he or she becomes incapacitated with no documents in place, there is the further possibility that a conservatorship may be required while the client lacks capacity and that probate may be required at the client's death. The attorney should specify a deadline after which the attorney will conclude that the client wishes to receive no further services from the attorney and that the attorney will close the file and send a closing statement for services already rendered.

PRACTICE TIP: The authors maintain a calendar system that prompts the attorney to send reminder letters about the estate planning documents after 3 months, 6 months, and 1 year. The letters remind the client that the documents are not valid unless they are signed, and after 1 year, indicate that there will be no further reminders. In addition, the authors bill for their work when the drafts are sent out. This helps many clients remember to contact the attorneys about their documents.

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Source: Estate Planning/Complete Plans for Small and Mid-Size Estates/12 Completing and Implementing the Estate Plan/§12.3 a. Form: 3-Month Reminder Letter

§12.3 a. Form: 3-Month Reminder Letter

12.3-1 3-month reminder letter

[*Attorney's letterhead*]

_ _[*Date*]_ _

_ _[*Name of client*]_ _
_ _[*Address of client*]_ _

Dear _ _[*name*]_ _:

On _ _[*date*]_ _, I mailed draft estate planning documents to you for your review. At your convenience, I would like to set up an appointment or telephone conference to assist you with completing and then signing your documents. As you know, the documents are not valid unless they are signed.

Please note that in order to complete the documents for signing we will need your answers to the questions we asked on page _ _[*page number*]_ _ of the letter we sent on _ _[*date*]_ _. A copy of that page is enclosed for your reference.

Please contact me to arrange an appointment. We can arrange to meet in person or discuss by telephone any questions. If you have decided not to go forward with signing the documents, please let me know.

I look forward to hearing from you.

__[*Signature*]__
_ _[*Typed name*]_ _

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Source: Estate Planning/Complete Plans for Small and Mid-Size Estates/12 Completing and Implementing the Estate Plan/§12.4 b. Form: 6-Month Reminder Letter

§12.4 b. Form: 6-Month Reminder Letter

12.4-1 6-month reminder letter

[*Attorney's letterhead*]

_ _[*Date*]_ _

_ _[*Name of client*]_ _
_ _[*Address of client*]_ _

Dear _ _[*name*]_ _:

I would like to set up an appointment or telephone conference to assist you with completing and then signing your _ _[*will/trust*]_ _ and the other documents discussed in my letter to you of _ _[*date*]_ _, a copy of which is enclosed for your convenience. As you know, the documents _ _[*, including documents transferring assets to your trust,*]_ _ are not valid unless they are signed.

Please contact me to arrange an appointment. We can arrange to meet in person or discuss by telephone any questions. If you have decided not to go forward with signing the documents, please let me know.

[*Add, if appropriate*]

In addition, I am enclosing a copy of the invoice that I mailed to you for services rendered to prepare the draft documents. I would appreciate payment as soon as possible.

[*Continue*]

I hope that we can arrange soon for you to complete these documents. I look forward to hearing from you.

__[*Signature*]__
_ _[*Typed name*]_ _

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Source: Estate Planning/Complete Plans for Small and Mid-Size Estates/12 Completing and Implementing the Estate Plan/§12.5 c. Form: 1-Year Letter

§12.5 c. Form: 1-Year Letter

12.5-1 1-year letter

[*Attorney's letterhead*]

_ _[*Date*]_ _

_ _[*Name of client*]_ _
_ _[*Address of client*]_ _

Dear _ _[*name*]_ _:

I hope you are doing well. In _ _[*month*]_ _ of _ _[*year*]_ _ I sent you draft estate planning documents for your review. As you know, the documents are not valid unless they are signed.

If you have decided not to go forward with signing the documents, please let me know. I will not contact you again regarding doing any further work until I hear from you. If I do not hear from you within 30 days from the date of this letter, I will conclude that you do not wish to receive further services and I will close the file

[*Add, if appropriate*]

and send a closing statement for services already rendered.

__[*Signature*]__
_ _[*Typed name*]_ _

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§12.6 2. Working With Client Who Is Seriously Ill

On occasion, the attorney will be asked to prepare an estate plan for a client who is seriously ill or who becomes ill before the plan has been completed. Clearly the attorney who knows in advance that time is short should not take on any estate planning project that the attorney does not have enough time or skill to perform competently. In addition, the attorney may wish to explain that plans prepared on an emergency basis or that require travel outside the office tend to cost more.

The attorney must recognize that a client who is under the stress of illness may be easily confused and tired, and may be particularly susceptible to undue influence. It may be difficult for the client to adequately communicate his or her wishes. As a result, the attorney must not only be patient and sympathetic, but must also be very careful to prepare documents that reflect only the client's wishes, not the suggestions of a well-meaning (or not) friend, family member, or caretaker.

If the client is seriously ill, the circumstances under which any estate planning documents are signed are likely to be scrutinized carefully if the new plan results in any unhappy heirs or beneficiaries. Accordingly, if at all possible the attorney should personally supervise the execution of the documents.

Finally, the attorney needs to be prepared for the emotional impact entailed in facing a client who is dying. The attorney must be prepared to cope with seeing the client in a hospital gown, possibly full of tubes and needles, and probably at his or her most vulnerable. Depending on the client's condition, the attorney may be asked to don protective clothing or at least wash his or her hands before meeting with the client. To avoid feeling at a loss for words when it is time to leave, it may help to have in mind something appropriate, *e.g.,* "I'm glad we were able to take care of this for you."

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Source: Estate Planning/Complete Plans for Small and Mid-Size Estates/12 Completing and Implementing the Estate Plan/§12.7 3. When Estate Plan Must Be Executed Outside of Office

§12.7 3. When Estate Plan Must Be Executed Outside of Office

If the attorney is not a notary public or does not employ one on staff, the attorney should maintain a list of traveling notaries who are willing to go to the hospital or the client's home, and who are sensitive to the needs of elderly or ill clients (*i.e.,* familiar with procedures for identifying signers who do not have access to a picture identification card, and who are willing to take sufficient time to allow the documents to be read to the signer and to execute the documents slowly, if need be).

NOTE: A notary cannot establish the identity of a person making an acknowledgement by personal knowledge; the identity must be established by satisfactory evidence, and the certificate of acknowledgment must be made under penalty of perjury. See CC §§1185, 1189.

The attorney must be prepared for the possibility of other practical difficulties when attempting to complete an estate plan outside of the office. Neither hospital rooms nor clients' homes are well designed for signing papers; the attorney may wish to bring a clipboard or some other hard surface for the client to use when signing the documents, and a pen that writes easily at almost any angle. It might be helpful to leave larger margins than usual in the documents, in case it is necessary to make hand-written changes that the witnesses and client can initial before signing. The attorney should consider limiting the number of signatures required, and plan to have the most critical documents signed first, if possible. Frequently, critically ill clients have only limited strength to sign papers. The attorney must be prepared to allow the client to sign the documents with an "X" by including the required additional signatures and language. See CC §14; CCP §17; Prob C §§6110 (execution of will), 4121 (execution of durable power of attorney for financial management), and 4673, 4675 (advance health care directive) for the requirements for recording documents signed with an "X" or by another person. See also §12.48.

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Source: Estate Planning/Complete Plans for Small and Mid-Size Estates/12 Completing and Implementing the Estate Plan/§12.8 4. Working With Client Who Cannot Complete the Estate Plan

§12.8 4. Working With Client Who Cannot Complete the Estate Plan

Occasionally a client will repeatedly ask the attorney to explain the documents. Because there are aspects of estate planning that are complicated, unfamiliar, and uncomfortable for many people, some confusion and difficulty in remembering specific aspects of the documents should be expected. The attorney can assist the client in the process of understanding the estate planning documents through the use of simple hand-outs about basic estate planning principles (the state bar offers some that can be found on its website (http://calbar.ca.gov) under Consumer Pamphlets), summaries of the prepared documents that highlight the most basic and important elements (*e.g.,* the purpose of the document, who the fiduciaries are, a summary of the key provisions (powers and/or distribution plan), and how the document comes into effect), and a cover letter explaining how the parts of the plan work together.

If, however, after providing these types of aids and a reasonable amount of personal explanation about the meaning of the documents, the client continues to request repeated explanations, the attorney should seriously consider whether the client truly has capacity to execute estate planning documents, or whether there are other obstacles to the client's understanding. The same considerations apply if the client continues to change his or her mind about the document provisions after drafts have been sent. It may be that another person is influencing the client, or at least giving the client contradictory advice about the meaning or effect of the documents. It is possible that the client is truly dissatisfied and unhappy with the outcome that can be achieved through estate planning. The attorney should continue to stress—in writing for the attorney's own protection—that the documents are not effective until they are properly executed. It may be helpful to point out that the documents can always be revised if the client changes his or her mind. The attorney may also need to remind the client of the expense of constantly changing the provisions or consulting with the attorney about the documents' meaning. The authors bill for estate planning on an hourly basis and make it clear in their engagement letter that if there are substantial changes after the drafts have been mailed to the client, there will be additional charges over the estimated fees.

If, after repeated attempts on the attorney's part, the client cannot complete the plan, the attorney may wish to formally disengage from representation of the client rather than face the risk that eventual heirs and beneficiaries will consider the attorney to have been less than diligent in performing the estate planning services.

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§12.9 5. When Important New Facts Come to Light After Drafts Completed

On occasion, after drafting the estate plan, the attorney learns new facts about the client's family dynamics, finances, or other personal circumstances that potentially affect the plan's success. For example, the attorney may learn that the two children named as cotrustees absolutely cannot get along, that the individual named as the executor is not financially responsible and cannot be trusted to segregate estate funds from personal funds, that there is a child born outside of the marriage who is not identified in the documents, or that there are not enough assets to fund all the specific bequests and still leave a residue for the client's primary beneficiaries.

Faced with such revelations, the attorney must recognize that there are two conflicting principles at work: (1) the attorney has a duty to advise the client to act in a way that will achieve the client's goals; and (2) ultimately, what the client does is entirely up to the client.

NOTE: Presumably the attorney has learned the new information from the client. If not, the attorney faces the delicate task of presenting to the client the information and the source from which it came, and attempting to determine whether the new information is accurate.

If it is the client who has revealed the information to the attorney, the attorney should point out to the client how it may affect the client's planning. It may be necessary to explain provisions of the law pertaining to omitted heirs or will contests, or tell stories about past clients who also thought their bickering children would suddenly become friends but whose estates became entangled in expensive and time-consuming litigation. It may be necessary to draw diagrams showing where all the money will go once the client is dead, and how there will be nothing left for the client's children if the client makes a specific gift to each of a long list of friends. The attorney must explain the consequences of failing to take the newly discovered facts into account, including, if appropriate, the fact that the omission could completely invalidate the client's plan. It is also prudent and relevant to advise the client that, because the client failed to provide accurate information from the beginning, the cost of the completing the estate plan will increase.

In the end, however, the client may choose to pursue his or her fairytale planning; for the attorney, the only choice will be to compete the planning as requested or withdraw from the representation. If the attorney completes the plan as requested, the attorney will want to document the concerns raised by the plan and perhaps even have the client sign an acknowledgment that the attorney has advised the client of the issues.

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Source: Estate Planning/Complete Plans for Small and Mid-Size Estates/12 Completing and Implementing the Estate Plan/§12.10 II. HANDLING THE DOCUMENTS AFTER SIGNING

§12.10 II. HANDLING THE DOCUMENTS AFTER SIGNING

Once the estate planning documents have been executed, it is good practice to review the documents one more time for errors. It is much easier to correct problems while dealing only with the client before copies have been made and disseminated. The attorney should address with the client various maintenance issues regarding estate planning documents, such as who should keep the original documents, who should receive copies, and what should be done with previous versions of documents.

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§12.11 A. Custody of Original Documents

The attorney and client must agree who will keep the original estate planning documents after execution. The documents should be kept in a safe place to reduce the risk of accidental loss or destruction, and should be accessible to the client during his or her lifetime. In the event of the client's incapacity, any original trust, durable power of attorney for financial management, and advance health care directive must be available to the client's nominated fiduciaries. At death, the original will must be accessible to the executor, and the original trust (if any) should be available to the successor trustee. It is not advisable, however, for the client to keep these documents in a location accessible to persons adversely affected by the terms of the will or trust.

The original documents are most commonly kept in the client's home safe or safe deposit box (see §§12.12-12.13), the attorney's safe or safe deposit box (see §12.14), or the vault of a corporate fiduciary such as a bank or trust company (see §12.15).

PRACTICE TIP: Regardless of whether the client, attorney, or corporate fiduciary will maintain the original documents, it is good practice to make sure that both the attorney's and the client's records reflect who received the originals after execution. This will make it easier to locate the original documents when they are needed and will protect the attorney from a claim that he or she lost an original document if the documents were transferred to the client. If the client will keep the originals, it is also important for the attorney to remind the client not to attempt to make changes to the estate plan by writing on the original documents. These issues can be addressed in a cover letter to the client sent with the copies and/or original documents after the signing. For a form of such a letter, see §12.75.

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1. Documents in Custody of Client

§12.12 a. In Client's Home

The client's home safe, if the client has one, has the advantage of affording easy access by the client during his or her lifetime, but may be vulnerable to accidental loss or destruction, and may also be accessible to persons who consider themselves adversely affected by the documents. If the client chooses to keep the documents in a home safe, the client should be reminded to give the fiduciary information about how to gain access to the documents.

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Source: Estate Planning/Complete Plans for Small and Mid-Size Estates/12 Completing and Implementing the Estate Plan/§12.13 b. Safe Deposit Box

§12.13 b. Safe Deposit Box

If the original documents are kept in the client's safe deposit box in a financial institution, they will be available only during the financial institution's business hours, but are more likely to be safe from nosy family members and household workers than if kept at the client's home, and may be more protected from natural disasters. It may be more difficult for the client's fiduciaries to obtain the documents when they are needed, however, and the attorney should advise the client to give his or her fiduciaries clear instructions on where and how to obtain the originals.

If the client's primary testamentary document is a will and the fiduciary is a spouse or adult child, it may be advisable for the client to add the fiduciary's name as a signer on the safe deposit box and give the fiduciary a key for easy access. Note, however that if the client keeps valuable assets in the safe deposit box (such as jewelry or gold coins) that are not intended to pass to the fiduciary, holding the safe deposit box in joint tenancy with the fiduciary could have unintended consequences and create a conflict with the client's testamentary plan.

If the original document is a will or trust, Prob C §331 provides a procedure that permits an individual with a key to the decedent's safe deposit box to access the box and remove original wills and trust documents on proof of the decedent's death. This procedure will not be helpful, however, if the documents are needed because the client has become incapacitated, or if the nominated fiduciary does not have a key to the box.

If the client's primary testamentary document is a revocable trust, it is generally recommended that the client transfer title to the safe deposit box to the trustee of the trust (and provide the successor trustee with access to a key). On the client's incapacity or death, once the successor trustee establishes his or her authority to act, the financial institution should allow the successor trustee unfettered access to the box. Moreover, the disposition of the contents of the box, if it contains any valuable assets, will not be affected by the successor trustee's access, as the terms of the trust will still control disposition.

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Source: Estate Planning/Complete Plans for Small and Mid-Size Estates/12 Completing and Implementing the Estate Plan/§12.14 2. Documents in Custody of Attorney

§12.14 2. Documents in Custody of Attorney

Some attorneys routinely retain the client's original estate planning documents, as this practice tends to encourage the client to return for subsequent estate planning and makes it more likely that the nominated executor or successor trustee will retain the attorney for administration of the estate after the client's death. However, the attorney may find that the disadvantages of retaining original documents outweigh the advantages.

Probate Code §§700-735 outline the responsibilities of an attorney with whom a client "deposits" his or her estate planning documents. If the attorney retains custody of the original documents, the attorney must use ordinary care to preserve the documents, whether or not the client pays the attorney to hold the documents. The attorney must keep the documents in a safe, vault, safe deposit box, or other secure place where they will be reasonably protected against loss or destruction. Prob C §710.

The client can terminate the deposit at any time on demand, but the attorney has limited options for terminating the deposit and returning the documents to the client: by personal delivery of the document to the client; by mailing to the last known address by registered or certified mail, return receipt requested, and receiving a signed receipt; or by a method agreed on by the client and the attorney. Prob C §§720, 731. The attorney should be aware that once he or she agrees to hold the originals it may be difficult and time-consuming to return the documents to the client, especially if the client has moved without giving the attorney the new address.

If the attorney decides to hold the client's original documents, Prob C §715 provides a form of notice that the attorney may give the client to acknowledge that the client has the obligation to keep the attorney advised of any changes in the client's address. If the client has signed such a form, and the attorney gives the client notice of termination of the deposit and the client then fails to collect the documents, the attorney can transfer the documents to another attorney or, if the custodial attorney has died or becomes unable to practice, the documents can be delivered to the clerk of the superior court of the county of the depositor's last known address. Prob C §732.

If a client fails to collect the documents after notice, the duty of the attorney retaining the documents or receiving documents under a §732 transfer is reduced to using "at least slight care" for preservation of the documents. Prob C §716. There does not seem to be any provision releasing the custodial attorney entirely from the duty to preserve the documents or addressing the situation when no acknowledgment has been received from the client (*e.g.*, for documents received before enactment of the statute). If the client fails to keep in contact with the attorney, it appears that the duty to preserve the original documents continues indefinitely.

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Source: Estate Planning/Complete Plans for Small and Mid-Size Estates/12 Completing and Implementing the Estate Plan/§12.15 3. Documents in Custody of Corporate Fiduciary

§12.15 3. Documents in Custody of Corporate Fiduciary

If the client turns the original estate planning documents over to a corporate fiduciary, the documents should be well protected from unauthorized access by disgruntled family members or beneficiaries, but, as with safe deposit boxes, the client faces the problem of obtaining the originals outside of normal business hours. In addition, if the client later decides not to use the corporate fiduciary's services as a fiduciary, the client may be reluctant to notify the corporate fiduciary of the change, and may simply store the next set of documents elsewhere. This could lead to multiple originals and questions regarding who has authority to act on the client's incapacity or death. If the client gives custody of the original documents to a corporate fiduciary, the attorney should encourage the client to inform the corporate fiduciary of changes to the plan.

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Source: Estate Planning/Complete Plans for Small and Mid-Size Estates/12 Completing and Implementing the Estate Plan/ B. Copies/§12.16 1. Copies for Attorney and Client

B. Copies

§12.16 1. Copies for Attorney and Client

The attorney should keep a fully conformed copy of every executed estate planning document that the attorney prepares. This will facilitate subsequent estate planning, and may be a valuable source of information for the client's family and fiduciaries if the client dies suddenly or becomes incapacitated without advising the fiduciaries of where or how to obtain the original documents. The attorney should also give copies of each document to the client, whether or not the client retains the original documents.

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§12.17 2. Copies for Fiduciaries

Some clients choose to give copies of their estate planning documents to the persons they have named as executors, trustees, guardians, and agents, both to confirm the client's choice of fiduciaries and to allow the nominated fiduciaries the opportunity to clarify their duties and the client's wishes while the client can still discuss them. In particular, corporate fiduciaries like to receive copies of documents in which they are nominated to act.

If a client is hesitant to give copies of the will or trust because the client does not want to reveal his or her testamentary plan before death, the attorney should nevertheless encourage the client to advise the named fiduciaries of their nomination and tell them how to obtain the original documents when the time comes. In addition, the attorney should strongly encourage the client to give copies of the advance health care directive to all the agents named in the directive. If an emergency arises and it becomes necessary to use the directive, the agent may not be able to make decisions on the client's behalf if the original is locked in a safe deposit box and no copies are available. The advance health care directive may also contain instructions regarding organ donation and disposition of remains, and thus should be readily available if and when appropriate circumstances arise. The client should also give copies of the advance health care directive to his or her primary care physician or health maintenance organization, and keep extra copies on hand, as they are routinely requested on admission to a hospital, even for outpatient procedures. Note that a copy of an advance health care directive has the same effect as the original. Prob C §4660.

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§12.18 3. Copies for Beneficiaries

Some clients choose to give copies of their estate planning documents to their beneficiaries, particularly if the fiduciaries and beneficiaries are the same individuals and the documents contain no provisions likely to disappoint anyone (*e.g.,* a widow leaving her entire estate to her only adult child). It is usually not a good idea to give copies of testamentary documents to beneficiaries under other circumstances, however, because that may lead to surprise and disappointment if the documents are revised and the client fails to notify the beneficiary of the changes.

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Source: Estate Planning/Complete Plans for Small and Mid-Size Estates/12 Completing and Implementing the Estate Plan/§12.19 C. Destruction of Previous Documents

§12.19 C. Destruction of Previous Documents

In general, clients should be advised to destroy their superseded estate planning documents. This reduces the possibility of confusion on the client's incapacity or death as to which document controls if there is more than one original document in existence, and helps to prevent a potentially disappointed beneficiary from discovering that an earlier gift has been reduced or eliminated.

The attorney, however, should clearly identify for the client which documents are revoked by subsequent versions and which are not. For example, a subsequent will almost always states that all previously executed wills of the testator are revoked. Durable powers of attorney for financial management also often clearly state that all prior durable powers of attorney for financial management are revoked. Probate Code §4698 provides that if an advance health care directive conflicts with an earlier directive, the earlier directive is revoked to the extent of the conflict. In each of these situations, the attorney can advise the client to destroy the earlier documents.

In some cases, earlier documents are not superseded. If a revocable trust is created, for example, and a subsequent amendment does not restate the original trust in its entirety, the client should be instructed not to destroy the original trust because it must be read in conjunction with the amendment. Even if the trust is restated in its entirety, the client should be advised to retain the original because the authority for all subsequent amendments and restatements derives from the original. The restatement does not create a new trust but continues the trust that was established under the original trust document. As a result, there is no need to retitle trust property.

PRACTICE TIP: If the client or attorney anticipates that the documents may be contested, the attorney should consult with litigation counsel regarding whether previous originals should be destroyed.

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§12.20 III. IMPLEMENTING THE PLAN

The steps necessary for the attorney and client to implement the estate plan will vary, depending on the nature of the documents involved. If the primary testamentary instrument is a will, there are no "funding" issues to address, as there would be with a revocable trust, but it still may be necessary to record deeds and create or change beneficiary designations. If the primary testamentary document is a revocable trust, the attorney and client must also decide which assets will be transferred to the trust and who will handle the transfers—the attorney, the client, or a combination of both. If the client is expected to handle funding, the attorney should provide clear instructions to assist the client.

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Source: Estate Planning/Complete Plans for Small and Mid-Size Estates/12 Completing and Implementing the Estate Plan/ A. Trust Funding/§12.21 1. Purpose of Funding

A. Trust Funding

§12.21 1. Purpose of Funding

If the client's estate plan includes a revocable trust, implementing the estate plan will require funding the trust in order to avoid conservatorship and probate proceedings. "Funding the trust" means transferring the title of appropriate assets to the trustee of the trust. See Prob C §15202. Although attorneys and clients frequently talk of transferring assets "into the trust," this is a short-hand term because a trust is not an entity that can own assets, so title must be taken in the name of the trustee as trustee. Usually the initial trustee will be the client (or clients, if husband and wife create a joint trust), but sometimes it will be the client and a third party or just a third party.

NOTE: While the trust is revocable and the client-settlor is alive, the trust uses the client's social security number as its tax identification number. If husband and wife are the settlors and trustees, either spouse's social security number may be used as the trust's tax identification number.

Funding the trust ensures that the successor trustee will be able to take over management of trust assets without delay on the client's incapacity or death, and clarifies which assets are intended to be controlled by the trust terms. Some assets, *e.g.,* most qualified pension plans, cannot be transferred to the trust during the client's lifetime. Other assets generally should not be transferred. Transferring a traditional individual retirement account regulated by IRC §408, for example, would constitute a withdrawal, triggering income tax liability on the withdrawal.

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Source: Estate Planning/Complete Plans for Small and Mid-Size Estates/12 Completing and Implementing the Estate Plan/§12.22 2. Division of Responsibilities Between Attorney and Client

§12.22 2. Division of Responsibilities Between Attorney and Client

Funding is frequently a joint effort by the attorney and the client. Most attorneys prepare and record the deeds to transfer title to real property, even if they leave other funding transfers to the client. Transfers of real property are discussed in detail in §§12.38-12.61. It is usually easiest for the client to handle the transfer of title to bank and brokerage accounts, as these institutions generally require the client to sign a new account agreement reflecting the trustee as owner of the account and to provide either a copy of the trust or a trust certification. For discussion of trust certification and sample form, see §§12.25-12.27. The degree to which the attorney assists the client in accomplishing other transfers will largely depend on whether the client is willing and able to undertake the necessary tasks or would prefer to pay the attorney to perform them. No matter how these tasks are divided between the attorney and client, if there are any transfers that the attorney will not complete, the attorney should make it clear that the client is responsible for completing them.

Most attorneys provide clients with a funding memorandum or letter that details the general procedures to follow to make the transfers. See §12.23. For a sample funding memorandum giving instructions for transferring title to typical assets, see §12.24. In the memorandum, the attorney should stress that assets acquired in the future should be transferred to the trust.

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Source: Estate Planning/Complete Plans for Small and Mid-Size Estates/12 Completing and Implementing the Estate Plan/§12.23 a. Funding Memorandum to Client

§12.23 a. Funding Memorandum to Client

Even if the attorney will be responsible for all of the initial transfers, a memorandum should be sent to the client with instructions for transfer of later-acquired or later-discovered assets that should be transferred to or titled in the name of the trustee. The language in the sample form in §12.24 can be revised depending on whether the attorney will be responsible for all or some of the funding transfers and whether there is one settlor or married settlors. The memo assumes that the deed or deeds transferring real property have been executed under the supervision of the attorney as part of the document-signing process.

If the client has original stock certificates, no matter what kind of estate plan the client chooses, the attorney should encourage the client to establish an account at a brokerage firm and have the stocks transferred to the brokerage account. It is much easier for the client (and his or her fiduciary) to keep track of stock splits, exchanges, and other changes to the stocks this way. In addition, holding the stocks in a brokerage account is especially useful if the client elects to create a revocable trust, because the financial firm will then handle the transfer of all stocks to the trust, usually without charging the normal fee.

NOTE: Some attorneys include language in the funding memorandum stating that the attorney has completed services for the client, that the attorney-client relationship is therefore terminated, and that any further services will require a new contract with the client. Other attorneys do not include such language in the memorandum but do include it in the closing letter. Still others do not include such language in the memorandum or the closing letter.

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Source: Estate Planning/Complete Plans for Small and Mid-Size Estates/12 Completing and Implementing the Estate Plan/§12.24 b. Form: Sample Funding Memorandum

§12.24 b. Form: Sample Funding Memorandum

12.24-1 Sample funding memorandum

[*Attorney's letterhead*]

To: _ _[*name of client*]**_ _**

From: _ _[*name of attorney*]**_ _**

Date: _ _[*date*]**_ _**

Re: Transferring Assets to Your Trust

The principal objectives of the _ _[*name of trust*]**_ _ (the "Trust"), a revocable trust, are to provide continuity of management of your assets during your life in case of incapacity and to avoid probate at your death. To accomplish these objectives, you should transfer title to your assets to yourself as Trustee in the following form:**

"_ _[*name*]**_ _, Trustee of the _ _**[*name of trust*]**_ _ Trust dated _ _**[*date*]**_ _, and successor Trustees."**

Some institutions with custody of assets may want to use a variation of this form of title. If the institution requests a different wording, the title should at a minimum include the name of the Trustee and the date the Trust was signed. The following is an example: "_ _[*name*]**_ _, TTEE UTD _ _**[*date*]**_ _." ("TTEE" stands for "trustee," and "UTD" stands for "under trust dated").**

1. *Real Estate*

You, as Settlor, have transferred your residence and other real property to yourself as Trustee of the Trust. This office will be responsible for recording the deed(s) with the county recorder and submitting the Preliminary Change of Ownership Report. The original recorded deed will be returned to you directly from the recorder's office.

The homeowner's exemption for your residence may need to be reestablished after the deed has been recorded. If so, you should receive a notice in the mail in a few months (or early in the next year in some counties) advising you that the exemption needs to be reestablished and giving you further instructions. It is your responsibility to check your next property tax bill to be sure you are still receiving the homeowner's exemption.

NOTE that if you refinance (or otherwise borrow against) real property that is held in the Trust, the lender may require that you transfer the property back to yourself as an individual before you execute the deed of trust that gives the lender a security interest in your property. If this happens, you should ask the title company to prepare a deed transferring title back to you as Trustee of the Trust as soon as refinancing is complete. Otherwise, if you die owning the property in your individual name, a probate proceeding will probably be necessary to transfer title to your beneficiaries on your death. If the title company will not prepare this deed for you, please contact me or another attorney to prepare and record the necessary deed.

You should notify your insurance company (and/or insurance broker) of the transfer to the Trust and request that the Trustee of the Trust be added as an additional insured on any policies, including your homeowner's insurance.

If you purchase other real property in California in the future, you should instruct that title company that you wish to take title in the following form: "_ _[*name*]**_ _, Trustee of the _ _**[*name of trust*]**_ _ Trust dated _ _**[*date*]**_ _, and successor Trustees."**

[*If applicable, add the following option*]

[*Option: Rental real property transferred to trust*]

If you have transferred rental property to the Trust, you should instruct the tenants to make future rent payments to the Trustee in the following form: "_ _[*name*]_ _, Trustee of the _ _[*name of trust*]_ _ Trust."

[*Continue*]

2. *Financial Accounts and Safe Deposit Box*

You should change title to your bank accounts, brokerage or mutual fund accounts, certificate of deposit accounts, dividend reinvestment accounts, other financial institution accounts, and safe deposit box to your name as Trustee. Usually the financial institution will not change the name on an existing account, but will require you to open a new account in your name as Trustee of the Trust. (Note that this can require changes to existing automatic deposit or withdrawal arrangements.) The financial institution will also want you to provide a copy of the trust or a "certification of trust" (which proves that the trust has been validly executed and the Trustee has the requisite powers to conduct trust business with the institution). In some instances, the institution will require you to sign their own version of a certification of trust. You may request that checks for new accounts just show your name and not indicate that you hold the account as Trustee of your Trust.

Many clients prefer to keep a household checking account in their individual names, especially if that account is set up for automatic deposits or withdrawals. However, we recommend that you limit the combined balance in all accounts held outside the Trust in your individual name to $20,000. Preferably, only one or two accounts should be kept in your individual name. Otherwise, over time, the total value of assets held in various accounts may increase without you noticing it. Under current law, a court-supervised probate proceeding may be necessary to transfer your assets on death if the total value of assets held outside the Trust exceeds $100,000. The $100,000 threshold does not include certain assets, including assets with beneficiary designations or assets held in joint tenancy.

3. *Individual Stocks and Bonds Held in Certificate Form*

If you hold title to individual stocks and bonds in certificate form (not in a brokerage account), you must change title on each individual certificate. You should contact the transfer agent for the company to obtain the appropriate forms. Transfers of individual stock certificates can be time-consuming and involve a lot of paperwork and possibly expense, especially if the original certificate has been lost. If you hold many individual certificates, it may be easier to open a brokerage account and transfer the stocks to the brokerage account, and then change title on the brokerage account.

4. *Household and Personal Items*

You transferred your interest in your household furniture and furnishings and personal effects to the Trust by signing the Assignment attached to the Trust. Generally, you can leave title to automobiles in your individual name.

If you have an insurance policy on your tangible personal items other than coverage under a policy on your home, you should request that the Trustee of the Trust be named as an additional insured on the policy.

5. *Title to Property Acquired in the Future*

You should take title to any assets you acquire in the future in the Trustee's name (rather than in your individual name) as follows: "_ _[*name*]_ _, Trustee of the _ _[*name of trust*]_ _ Trust dated _ _[*date*]_ _, and successor Trustees."

6. *Do Not Change Title to Certain Types of Property*

Note that you should *not* change title to Individual Retirement Accounts, other qualified pension and retirement plans, or life insurance policies. The disposition of these assets on death should be directed by beneficiary designation.

IMPORTANT REMINDER: If you do not complete the transfers of your assets to the Trust in a timely manner, *i.e.,* before your incapacity or death, it is likely that probate proceedings will be required to manage or transfer

your assets, which will defeat one of your estate planning objectives.

[*Add one of the following alternatives*]

[*Alternative 1: Ongoing representation*]

Please do not hesitate to contact me for assistance or with any questions about the funding or administration of the Trust.

[*Alternative 2: Time limit for further services*]

Please do not hesitate to contact me for assistance or with any questions about the funding of the Trust. If I have not heard from you within _ _[*e.g., 30/60 days*]_ _ of the date of this letter, I will conclude that you no longer need my assistance and I will close the file. Any additional work after that date will require a new contract and will be billed separately.

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Source: Estate Planning/Complete Plans for Small and Mid-Size Estates/12 Completing and Implementing the Estate Plan/§12.25 3. Trust Certification

§12.25 3. Trust Certification

Many third parties will ask the client to provide a copy of the trust as part of the transfer process. Understandably, the client may be reluctant to disseminate copies of the trust, which include private information about the distribution of assets on death. Fortunately, under Prob C §18100.5, a trustee is authorized to present a certification of trust to any person in lieu of providing a copy of the trust to prove the trust's existence and terms. A trust certification generally provides the following information (see Prob C §18100.5(b)):

- The existence of the trust and date of execution;
- The identity of the settlor or settlors and the currently acting trustee or trustees;
- The powers of the trustee;
- Whether the trust is revocable or irrevocable and the identity of any person holding the power to revoke the trust;
- If there is more than one trustee, whether all or less than all of the trustees are required to sign to exercise various powers of the trust;
- The tax identification number for the trust; and
- The manner in which title to trust assets should be taken.

The certification may also contain the legal description of any real property held in the trust. Prob C §18100.5(b)(8).

The certification must contain a statement that the trust has not been revoked, modified, or amended in any manner that would cause the representations in the certification to be incorrect. It must further contain a statement that the certification is being signed by all currently acting trustees of the trust. The certification must be in the form of an acknowledged declaration. Prob C §18100.5(c).

The trust certification is not required to contain the dispositive provisions of the trust that set forth the distribution of the trust estate. Prob C §18100.5(d). The usual practice is to attach copies of the pertinent provisions of the trust to the certification, including the opening declaration of trust, the identity of the successor trustees, the signing authority of multiple trustees, the trustee powers, and the signature pages and notary acknowledgment.

The certification may be recorded in the office of the county recorder in the county where all or a portion of the real property is located. Prob C §18100(c), (i). There is no requirement that the certification be recorded in conjunction with the recordation of a transfer of title of real property involving a trust, *e.g.,* a deed transferring real property into the name of the trustee. Prob C §18100.5(i).

PRACTICE TIP: Although there is no requirement that the certification contain a declaration under penalty of perjury, many attorneys include the penalty of perjury language in order to facilitate acceptance by third parties, particularly title companies.

For sample certification, see §12.27.

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Source: Estate Planning/Complete Plans for Small and Mid-Size Estates/12 Completing and Implementing the Estate Plan/§12.26 a. Acceptance of Certification

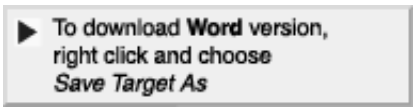
§12.26 a. Acceptance of Certification

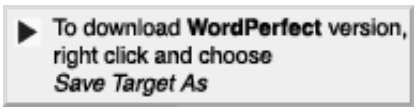
Any person who acts in reliance on a trust certification (without actual knowledge that any facts contained in the certification of trust are incorrect) has no liability to any person for so acting, and has no duty to inquire further into the existence of the facts contained in the certification. Prob C §18100.5(f). A person who refuses to accept the certification or demands the trust documents in addition to the certification to prove facts set forth in the certification is liable for any damages caused by the refusal to accept the certification in lieu of the trust documents, if the court determines that the person acted in bad faith. Prob C §18100.5(h).

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Source: Estate Planning/Complete Plans for Small and Mid-Size Estates/12 Completing and Implementing the Estate Plan/§12.27 b. Form: Sample Certification

§12.27 b. Form: Sample Certification





12.27-1 Sample certification of trust

TRUSTEE'S CERTIFICATION OF TRUST

_ _[*I/We*]_ _**, the undersigned, declare:**

(1) That _ _[*I am/we are*]_ _ **the current trustee(s) of the trust established by** _ _[*name(s) of settlor(s)*]_ _ **on** _ _[*date*]_ _**.**

(2) Attached is a true and correct copy of the portion of the trust instrument that provides that the declarant(s) _ _[*is/are*]_ _ **the trustee(s).**

[*Add one of the following alternatives*]

[*Alternative 1: Unmarried settlor*]

(3) This trust may be revoked by the settlor at any time.

[*Alternative 2: Married settlors*]

(3) Each settlor has the power to revoke the trust as to any community property and his or her separate property.

[*Continue*]

[*Add one of the following alternatives*]

[*Alternative 1: Unmarried settlor*]

(4) The trust's taxpayer identification number is _ _[*settlor's social security number*]_ _**.**

[*Alternative 2: Married settlors*]

(4) The trust's taxpayer identification number is _ _[*social security number of first spouse*]_ _ **or** _ _[*social security number of second spouse*]_ _**.**

[*Continue*]

(5) Title to assets of this trust should be stated as: "_ _[*name*]_ _ _ _[*and name*]_ _**, trustee(s) of the** _ _[*name of trust*]_ _**, dated** _ _[*date*]_ _**, and successor trustees thereunder."**

[*If appropriate, add*]

(6) _ _[*The trustee may take any action on behalf of the trust/Either trustee acting alone may take action on behalf of the trust, except that the sale or encumbrance of real property requires the signatures of both trustees.*]_ _

[*Continue*]

(7) Attached is a true and correct copy of the portion of the trust instrument that lists the powers of the trustee(s).

(8) The trust has not been revoked, modified, or amended in any manner that would cause the representations in this certification to be incorrect.

(9) This certification is being signed by all currently acting trustees of the trust.

(10) Probate Code §18100.5(h) provides that any person refusing to accept this certification shall be liable for damages, including attorney's fees, if the court determines that the person acted in bad faith.

_ _[*I/We*]_ _ declare under penalty of perjury under the laws of the State of California that the foregoing statements are true and correct.

[*Use two signature blocks if cotrustees*]

Date: _ _ _ _ _ _ __[*Signature of trustee*]__
_ _[*Typed name*]_ _

Acknowledgment

State of California)
County of _ _[*name*]_ _)
_____)

On _ _[*date*]_ _, before me, _ _[*name and title of officer*]_ _, personally appeared _ _[*name(s)*]_ _, who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) 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:

__[*Signature of officer*]__ [*Officer's Seal*]

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Source: Estate Planning/Complete Plans for Small and Mid-Size Estates/12 Completing and Implementing the Estate Plan/§12.28 4. Forms Used to Transfer Assets to Trust

§12.28 4. Forms Used to Transfer Assets to Trust

Transfers of real property from the settlor as an individual to the settlor as trustee of his or her trust are accomplished by executing a deed. See §§12.38-12.61. The attorney generally prepares the deed, supervises its execution, and is responsible for having the deed recorded and submitting the required accompanying documents, including the Preliminary Change of Ownership Report (see §§12.54-12.57), to the recorder's office.

Various forms of personal property (personal effects, promissory notes, business interests, etc.) are transferred by assignment from the settlor as an individual to the settlor as trustee. See §§12.29-12.33.

Banks and brokerage firms usually have their own forms which the client must fill out and submit to transfer title of an account to a trustee, often accompanied by a letter of instructions. See §§12.34-12.35.

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Source: Estate Planning/Complete Plans for Small and Mid-Size Estates/12 Completing and Implementing the Estate Plan/§12.29 a. Assignment

§12.29 a. Assignment

An assignment can be used to transfer title to many assets for which there is no other specified procedure, such as tangible personal property (see §12.30), promissory notes (see §12.31), and partnership interests. If a promissory note is assigned to the trustee, the trustee should notify the debtor by letter that future payments on the note should be made to the trustee. See §12.32 for a sample letter. Note that the attorney should review the partnership agreement, if any, before transferring partnership interests to confirm that there is no prohibition or requirement of consent to make the transfer.

Many attorneys routinely prepare a general assignment as an exhibit to the trust (see §12.33), sometimes adding schedules to list both real property and personal property. While this should not be a substitute for making actual title transfers, it does show the client's intent to hold the assets in trust if the client becomes incapacitated or dies before the transfers can be completed.

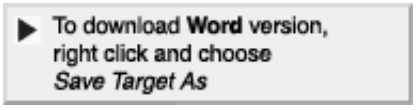
PRACTICE TIP: Some attorneys include a notary acknowledgment in their assignment forms. It can facilitate third party acceptance and might be useful if litigation arises over the authenticity or date of execution of the assignment. Because the general assignment in §12.33 specifically includes real property, and therefore may be recorded, it should be acknowledged.

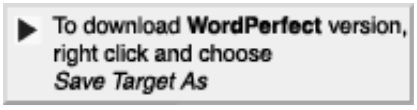
NOTE: If a trust contains a schedule or if there is an assignment to the trust listing the assets that will be or have already been transferred to the trust, a proceeding under Prob C §850 may be used to seek a court order stating that the listed property is a trust asset, despite the fact that the settlor did not formally transfer title or possession. See §12.37.

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Source: Estate Planning/Complete Plans for Small and Mid-Size Estates/12 Completing and Implementing the Estate Plan/§12.30 (1) Form: Sample Assignment of Tangible Personal Property

§12.30 (1) Form: Sample Assignment of Tangible Personal Property





12.30-1 Sample assignment of tangible personal property

ASSIGNMENT OF TANGIBLE PERSONAL PROPERTY

For no consideration, _ _[*name*]_ _ and _ _[*name*]_ _ ("Settlors") assign and transfer to _ _[*name*]_ _ and _ _[*name*]_ _, Trustees of the _ _[*name of trust*]_ _ Trust dated _ _[*date*]_ _ ("Trustees"), all of the Settlors' right, title, and interest in and to the property identified below, and the Trustees accept such property and agree to hold the property on the terms and conditions and for the uses and purposes set forth in the Trust:

1. All articles of personal and household use now owned or acquired later, including furniture, furnishings, pictures, paintings, works of art, china, silver, clothing, jewelry, sporting equipment, automobiles, books, collections of tangible personal property, personal effects, and other items of a tangible and personal nature normally kept at the Settlors' residence or elsewhere.

2. All policies of insurance covering such property and any proceeds of these policies.

3. This assignment shall become effective immediately as to all right, title, and other interests in property currently held by the Settlors, and shall further become effective prospectively as to all such interests later acquired by them, except as follows:

(a) If either Settlor gives written notice to the Trustees of the termination of this assignment, this assignment shall be ineffective as to acquisitions of such Settlor after the Trustees' receipt of the notice.

(b) This assignment shall be ineffective as to any future acquisitions of the Settlors if they, at the time of such acquisition, so provide and give written notice to the Trustees.

SETTLORS:

Date: _ _ _ _ _ _ __[*Signature of settlor*]__
_ _[*Typed name*]_ _

Date: _ _ _ _ _ _ __[*Signature of settlor*]__
_ _[*Typed name*]_ _

The trustees accept this assignment and agree as above.

TRUSTEES:

Date: _ _ _ _ _ _ __[*Signature of trustee*]__
_ _[*Typed name*]_ _

Date: _ _ _ _ _ _ __[*Signature of trustee*]__
_ _[*Typed name*]_ _

Comment: The form can be modified if there is only one settlor and/or one trustee.

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Source: Estate Planning/Complete Plans for Small and Mid-Size Estates/12 Completing and Implementing the Estate Plan/§12.31 (2) Form: Sample Assignment of Promissory Note

§12.31 (2) Form: Sample Assignment of Promissory Note

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▶ To download **WordPerfect** version, right click and choose *Save Target As*

12.31-1 Sample assignment of promissory note

ASSIGNMENT OF PROMISSORY NOTE

FOR NO CONSIDERATION, I, _ _[*name*]_ _ (Settlor), transfer to _ _[*name*]_ _, Trustee of the _ _[*name of trust*]_ _ Trust dated _ _[*date*]_ _, all right, title, and interest held by me in and to that certain Promissory Note (Note) dated _ _[*date*]_ _, in the face amount of $_ _[*amount*]_ _, executed by _ _[*name of debtor*]_ _, together with any interest accrued. A copy of the Note is attached to this Assignment and by this reference is made a part of it.

Date: _ _ _ _ _ _ __[*Signature of settlor*]__
_ _[*Typed name*]_ _

Comment: As an alternative to an assignment, the promissory note can be endorsed to the trustee as trustee of the trust.

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Source: Estate Planning/Complete Plans for Small and Mid-Size Estates/12 Completing and Implementing the Estate Plan/§12.32 (3) Form: Sample Letter to Payor Regarding Payment on Promissory Note

§12.32 (3) Form: Sample Letter to Payor Regarding Payment on Promissory Note

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▶ To download **WordPerfect** version, right click and choose *Save Target As*

12.32-1 Sample letter to payor regarding payment on promissory note

_ _[*Date*]_ _

_ _[*Name(s) of payor(s)*]_ _
_ _[*Address*]_ _

Re: Note Payments

Dear _ _[*name(s) of payor(s)*]_ _:

Enclosed is a copy of the assignment of your note dated _ _[*date*]_ _, to my revocable trust, the _ _[*name of trust*]_ _ Trust dated _ _[*date*]_ _. Please make all future payments on the note as follows:

"_ _[*name*]_ _, Trustee"

My address remains the same. Thank you.

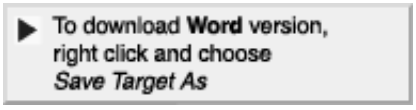
Very truly yours,

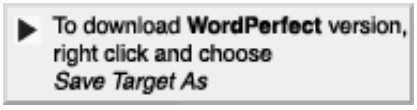
__[*Signature*]__
_ _[*Typed name*]_ _

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Source: Estate Planning/Complete Plans for Small and Mid-Size Estates/12 Completing and Implementing the Estate Plan/§12.33 (4) Form: Sample General Assignment

§12.33 (4) Form: Sample General Assignment





12.33-1 Sample general assignment

ASSIGNMENT OF PROPERTY TO TRUST

_ _[*Name of settlor*]_ _**, ("Settlor"), assigns and transfers to** _ _[*name of trustee*]_ _ **("Trustee") of the** _ _[*name of trust*]_ _ **Trust dated** _ _[*date*]_ _**, all of Settlor's right, title, and interest in and to all of the property owned by Settlor that would otherwise be subject to probate on the death of Settlor, to be held, administered, and distributed according to the terms of the Trust. This property includes, without limitation, Settlor's home; other real property; all stocks, bonds, mutual funds, and other financial investments; cash; business interests; and tangible personal property. The term "tangible personal property" includes all articles of personal and household use now owned or acquired later, including furniture, furnishings, pictures, paintings, works of art, china, silver, wine, clothing, jewelry, sporting equipment, automobiles, books, collections of tangible personal property, personal effects, and other tangible personal property normally kept at Settlor's residence or elsewhere. The term "tangible personal property" also includes all insurance policies covering this tangible personal property and any proceeds of these policies.**

[*If applicable, add the following option*]

[*Option: Property to be specifically excluded from trust*]

Despite the foregoing paragraph, the trust property does *not* include any of the following property: _ _[*Specify*]_ _**.**

[*Continue*]

Date: _ _ _ _ _ _ __[*Signature of settlor*]__
_ _[*Typed name*]_ _
Settlor

[*Acknowledgment; see §12.27 for form*]

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Source: Estate Planning/Complete Plans for Small and Mid-Size Estates/12 Completing and Implementing the Estate Plan/ b. Transfer of Accounts/§12.34 (1) Letter of Instructions

b. Transfer of Accounts

§12.34 (1) Letter of Instructions

Many financial institutions and transfer agents require that the client submit a letter of instructions in order to transfer title to individual investments or financial accounts. Frequently, the signature on such letters must be "medallion guaranteed," *i.e.,* authenticated by a signature verification service that is generally performed by banks, trust companies, or member firms of a nationally recognized security exchange. The letter of instructions should include information to identify the asset to be transferred, the manner in which title should be held, and the fact that the social security number and mailing information will stay the same. In addition, a copy of the trust or a certification of trust will probably be required.

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Source: Estate Planning/Complete Plans for Small and Mid-Size Estates/12 Completing and Implementing the Estate Plan/§12.35 (2) Forms Supplied by Asset Holder

§12.35 (2) Forms Supplied by Asset Holder

While some financial institutions and transfer agents accept a letter of instructions, most banks and brokerage firms have their own forms that must be filled out to transfer title to an account to the trustee of a trust or to create a trust account. The forms vary in the amount of detail that they require and in the clarity of the written instructions for filling them out. In many cases, the client can ask for help in filling out the form with a broker in the firm or a bank representative. If that is not possible, the attorney may be asked to help decipher the instructions and fill out the form.

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Source: Estate Planning/Complete Plans for Small and Mid-Size Estates/12 Completing and Implementing the Estate Plan/§12.36 c. Transfer of Stock Certificates and Treasury Bonds

§12.36 c. Transfer of Stock Certificates and Treasury Bonds

Many practitioners elect not to transfer stocks for clients because it can be a laborious task. Instead, they give the client a letter of instructions addressed directly to the transfer agent to be sent by the client by certified mail with the stock certificates and the certification of trust. They also prepare a signature-guaranteed stock power for the client to sign in the presence of the signature guarantor. The client should be instructed to send the certificate and stock power in separate envelopes to prevent someone from intercepting the certificate and stock power together, because the certificate is negotiable if found with the stock power. See Funding a Revocable Trust, step 35 (Cal CEB Action Guide October 2009). The attorney should include the instructions about signing and mailing the two documents to the client in the funding memorandum.

Transfer of original U.S. government savings bonds to a revocable trust can also be laborious. The attorney may choose to include instructions in the funding memorandum about how to obtain a transfer form from the United States Treasury, but make it the client's responsibility to complete the form and mail it to the government agency for retitling once the trust has been created. See Funding Rev Trust, step 35.

If the attorney will be responsible for transferring assets such as original stock certificates or U.S. government savings bonds to a revocable trust, the attorney should make it clear to the client that there will be extra charges due to the time-consuming nature of such tasks.

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Source: Estate Planning/Complete Plans for Small and Mid-Size Estates/12 Completing and Implementing the Estate Plan/§12.37 5. Funding by Court Order

§12.37 5. Funding by Court Order

If a trust contains a schedule or if there is an assignment to the trust listing the assets that will be or have already been transferred to the trust, a proceeding under Prob C §850 may be used to seek a court order stating that listed property is a trust asset, despite the fact that the settlor did not formally transfer title or possession. See also *Estate of Heggstad* (1993) 16 CA4th 943, 20 CR2d 433, in which the court held that a written declaration of trust by the owner of real property that included an attached schedule listing a specific property was sufficient to create a trust in that property, and that a transfer of title was unnecessary when a settlor declares himself or herself to be a trustee in his or her own property. For further discussion and sample *Heggstad* petition, see California Trust Administration §§15.39A, 15.40A-15.40B (2d ed Cal CEB 2001).

PRACTICE TIP: One of the most common unintentional omissions is the failure to transfer title back to the trust after refinancing. Most people do not consult their estate planning attorney when refinancing and are probably unaware that they need to retitle the property in the name of the trustee of the trust once refinancing is complete. Counsel should be aware that in at least one county there is an unwritten local rule that the probate court will not declare real property to be an asset of the trust even if listed on a trust schedule in this situation, based on an assumption that the failure to deed the property back to the trustee of the trust shows a lack of intent that the property was to be subject to the trust. For this reason, the sample funding memorandum in §12.24 contains an explicit warning on this subject.

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Source: Estate Planning/Complete Plans for Small and Mid-Size Estates/12 Completing and Implementing the Estate Plan/§12.38 B. Real Property Deeds

§12.38 B. Real Property Deeds

The correct preparation and recording of deeds to transfer real property, typically the client's residence, is essential to fulfilling a client's estate plan. In some simple estate plans, the deed will be the one document that actually implements the client's estate plan. Transfers by deed are commonly used to transfer real property to a revocable trust. Transfer deeds may also be part of the estate plan of married couples, *e.g.,* to change title from joint tenancy to community property or community property with right of survivorship. Unmarried persons who are sole owners of property or who own property as a tenant in common may wish to create joint tenancies as part of their estate plans. If they hold property as a joint tenant, they may wish to terminate the joint tenancy so that they can transfer their interest to their trust naming a beneficiary other than the joint owner.

NOTE: There is a separate assignment procedure that must be followed if the client purchased the home under the Cal-Vet program, because Cal-Vet holds legal title to the property. The attorney or client should contact the Department of Veterans Affairs for further information.

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§12.39 1. Grant Deed or Quitclaim Deed

There are two main types of deeds in California that transfer real property: a grant deed and a quitclaim deed. A grant deed is the preferable method for clients to transfer property to themselves, their trusts, or relatives because it includes all the implied warranties and covenants of title. CC §§1105, 1113. A quitclaim deed only transfers whatever interest the grantor possesses at the time of the transfer. *Klamath Land & Cattle Co. v Roemer* (1970) 12 CA3d 613, 618, 91 CR 112. A quitclaim deed does not transfer after-acquired title. See CC §1106. If a grantor did not have full ownership of a property at the time of a transfer, but later acquired full fee ownership of the property, the transferee of a grant deed would own the later-acquired full fee ownership. A transferee of a quitclaim deed would not. For these reasons, a grant deed should generally be used to transfer property to implement the estate plan.

NOTE: There is a third type of deed, the warranty deed. With a warranty deed, the grantor agrees to defend the grantee and the property against claims of third parties. CC §3304. Because most buyers now secure title insurance when purchasing property, warranty deeds are no longer used in California.

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Source: Estate Planning/Complete Plans for Small and Mid-Size Estates/12 Completing and Implementing the Estate Plan/ 2. Common Transfer Scenarios/§12.40 a. Transfers to Trust

2. Common Transfer Scenarios

§12.40 a. Transfers to Trust

To transfer real property to a trust, the client executes a grant deed, frequently called a "trust transfer deed," to himself, herself, or (in the case of dual clients) themselves as trustee(s) of the trust. A trust transfer deed includes all the warranties of a grant deed as long as the word "grant" is used in the conveyancing language. CC §1113. Although the client is usually transferring his or her interest in property to himself or herself as trustee of his or her revocable trust (or in the case of married clients to their joint revocable trust), in some cases, because the client no longer wants to manage his or her own property, the trustee of the trust may be an individual other than the client, or an entity.

PRACTICE TIP: If the client transfers real property that is not residential property into the trust, the transfer may trigger any due-on-sale clause in any mortgage or other loan on the property. The client should be advised to consider obtaining the permission of the lender before making the transfer, especially if the client has a large loan with an interest rate that is below the current market rate.

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§12.41 b. Married Couples

Many spouses, especially those who purchased property decades ago, take title to real property as "husband and wife, as joint tenants" because they want the property to pass to the surviving spouse on the death of the first spouse without the need for a court proceeding. Because there are tax advantages to holding title to property as community property rather than in joint tenancy (see §7.26), the estate plan will often include transfer of title of the joint tenancy property to community property. Such a transfer constitutes a transmutation of their separate property joint tenancy interests to community property interests. See §7.26. See §12.50 for discussion of transmutation and sample language.

If they are establishing a trust as part of the estate plan, the couple will execute a second deed transferring the property from themselves as community property to themselves as trustees of their trust. If they do not establish a trust but nevertheless want the tax advantage of community property and also the advantage of a transfer to the surviving spouse on the first death without the requirement of a court proceeding, they can transfer title, transmuting their separate property interests to community property interests, by executing a deed from themselves as husband and wife, as joint tenants, to themselves, husband and wife, as community property with right of survivorship. See §12.51 for requirements and sample language.

NOTE: Most attorneys who create a trust for a married couple use two deeds to transfer to the trust real property that the couple holds either as joint tenants or tenants in common, if the clients intend the property to be community property. The first deed transfers title to the couple as community property, and the second deed transfers title to the couple as trustees of the trust. This avoids any questions about the character of the property in the trust (because many trusts contain a clause stating that property transferred to the trust retains the same character it had before the transfer to the trust). Some attorneys, however, transfer a married couple's joint tenancy or tenancy-in-common real property directly to husband and wife as trustees of their trust, who state on the face of the deed that they intend the property to be their community property. See §12.50 regarding the additional language required for making a transmutation to community property.

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§12.42 c. Unmarried Persons

Unmarried persons who acquired real property as tenants in common may execute a deed transferring title to themselves as joint tenants as part of their estate plan. Conversely, if the parties have taken title as joint tenants, they may want plans in which each person controls the distribution of his or her interest in the property at death. Each may want a plan, either under a will or a trust, that calls for distribution of his or her interest to a third party or for distribution of a life estate to the survivor with the remainder going to a third party at the survivor's death. In this situation, the parties will first sever the joint tenancy by transferring title to themselves as tenants in common. For sample language, see §12.49.

A joint tenant can sever the joint tenancy unilaterally by execution of a deed. For sample language unilaterally severing a joint tenancy of an unmarried person, see §12.49.

If either party creates a trust, he or she can transfer his or her interest to his or her trust. If the parties hold title as tenants in common, one deed will accomplish the transfer. If the parties hold title as joint tenants, the better practice is to effect the transfer in two steps: first executing a deed severing the joint tenancy, and then executing a deed transferring the party's interest to himself or herself as trustee of his or her trust.

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§12.43 d. Transfers to Third Parties

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In some cases, the client wants to add a child, partner, or relative to title to the property as a joint tenant so that the property may pass directly to the third party on the death of the client. As explained in §7.24, this is generally not advisable.

A deed transferring the property would include the following grantor and grantee language:

***A,* an unmarried _ _**[*man/woman*]**_ _, hereby grants to *A,* an unmarried _ _**[*man/woman*]**_ _ and *B,* an unmarried _ _**[*man/woman*]**_ _, as joint tenants…**

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Source: Estate Planning/Complete Plans for Small and Mid-Size Estates/12 Completing and Implementing the Estate Plan/§12.44 3. Requirements for All Grant Deeds

§12.44 3. Requirements for All Grant Deeds

The required elements of a grant deed are discussed in §§12.45-12.48. See CC §1092. Many attorneys use their own grant deed forms. Others use preprinted forms obtained from either a title company or a stationery store. A deed is often titled "Trust Transfer Deed" for a transfer to a revocable trust to indicate that the transfer is not one for consideration.

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Source: Estate Planning/Complete Plans for Small and Mid-Size Estates/12 Completing and Implementing the Estate Plan/§12.45 a. Grantor Name

§12.45 a. Grantor Name

The grant deed must provide the grantor's name. The grantor name should be exactly the same as the grantee in the previous deed. If the grantor has changed his or her name, the deed must contain the grantor's former name. CC §1096.

Some examples of grantor names are:

- If Martha Adams originally acquired the property as Martha Washington, the name of the grantor should read: "Martha Adams, formerly known as Martha Washington," or "Martha Adams, who acquired title as Martha Washington."
- If a married person acquired property as separate property, the name of the grantor should read: "*A,* a married man/woman, who acquired title as his/her sole and separate property."

NOTE: If an estate plan transfers separate real property of a married person to a couple's trust, some attorneys will have the other spouse execute a quitclaim deed from him- or herself to the separate property owner spouse as the owner spouse's separate property.

- If an unmarried man acquired the property as Joe Smith, Jr., but he no longer uses "Jr.," the name of the grantor should read: "Joe Smith, formerly known as Joe Smith, Jr." or "Joe Smith, who acquired title as Joe Smith, Jr."
- If a married couple took title as "*A* and *B,* Husband and Wife, as Joint Tenants" or as "*A* and *B,* Husband and Wife, as Tenants in Common," all of this language should be used as the grantor name.
- If unmarried persons took title as "*A,* an unmarried man/woman and *B,* an unmarried man/woman, as Joint Tenants" or "*A,* an unmarried man/woman, and *B,* an unmarried man/woman, as Tenants in Common," all of this language should be used as the grantor name.

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Source: Estate Planning/Complete Plans for Small and Mid-Size Estates/12 Completing and Implementing the Estate Plan/§12.46 b. Grantee Name

§12.46 b. Grantee Name

The deed must also include the name of the grantee, or transferee, of the property. It is very important that the grantee name include the method of holding title. If there are multiple grantees and the method of holding title is not designated, it is assumed that the property is held by the grantees as tenants in common. CC §685.

Some examples of grantee names are:

- If spouses are transferring property to themselves as community property with right of survivorship, the grantee name should read: "*A* and *B,* husband and wife, as community property with right of survivorship."
- If spouses are transferring property to their revocable trust, the grantee name should read: "*A* and *B,* Trustees of the _ _[*name*]_ _ Revocable Trust dated _ _[*date*]_ _, and successor Trustees."
- If Joe Smith originally took title as Joe Smith, Jr., but no longer signs his name "Jr.," the grantee name should be "Joe Smith."
- If *A,* an unmarried person, and *B,* an unmarried person, are taking title or transferring title to themselves as joint tenants or tenants in common, the grantee names should be designated as "*A,* an unmarried man/woman and *B,* an unmarried man/woman, as Joint Tenants" or "*A,* an unmarried man/woman, and *B,* an unmarried man/woman, as Tenants in Common."

PRACTICE TIP: The attorney should be sure to find out how clients normally sign their names. Too often deeds are prepared using clients' full middle names, when clients rarely sign with their full middle names. If the initial deed transferring the property to one or more clients used some form of a client's legal name that he or she normally does not use, the attorney can take the opportunity when preparing the new deed to use the correct form of the client's name as grantee. As noted in §12.45, the grantor name must be exactly the same as the grantee name in the previous deed but the grantee name in the new deed may be in a different form.

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Source: Estate Planning/Complete Plans for Small and Mid-Size Estates/12 Completing and Implementing the Estate Plan/§12.47 c. Description of the Property

§12.47 c. Description of the Property

The grant deed must contain a legal description of the property. It is very important that the legal description of the property be correct. An incorrect legal description can hold up the sale of a property and be costly to the client to correct.

PRACTICE TIP: Although not required, as a practical matter it is helpful to put the address of the property on the face of the deed. For clients with multiple properties, this makes it much easier to determine which deed corresponds to which property.

Many attorneys place the legal description on separate sheets in an attachment at the end of the document that is called "Exhibit A," and insert in the body of the deed language such as "See Exhibit A" in the place where the legal description is called for.

PRACTICE TIP: The authors try to photocopy the legal description used in the previous deed into the transfer deed so that there is no possibility of scrivener error in retyping the legal description from the previous deed. However, there are times when the legal description cannot be copied. The recorder's office will refuse to record a legal description if any part of it is illegible. When the legal description must be retyped, the authors make sure that two people in the office proofread the legal description. In addition, when sending a copy of the draft deed to the client, the authors advise the client that they have not conducted an independent review of the legal description and that the office has used the legal description from the grant deed provided by the client or the title company.

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§12.48 d. Signature

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The grant deed must be signed by the grantor. CC §1091. If the grantor does not have capacity to sign the deed, an agent under a durable power of attorney may sign on behalf of a principal in the following form: "_ _[*Grantor's name*]_ _ by _ _[*name of agent*]_ _, _ _[*his/her*]_ _ Attorney in Fact." CC §1095. If the grantor has capacity to sign but can only sign by mark, the mark can be treated and acknowledged as a signature if another person signs the grantor's name near the mark and subscribes his or her own name as a witness, and an additional witness also subscribes his or her name to the document. CC §14; CCP §17.

Although there is no statutory requirement, county recorders also require the following statement to be written or typed on the document and signed by the witness in order to record a document signed by mark:

_ _[*Name of signer*]_ _**, being unable to write, made** _ _[*his/her*]_ _ **mark in our presence and requested the first of the undersigned to write** _ _[*his/her*]_ _ **name, which** _ _[*he/she*]_ _ **did, and we now subscribe our names as witnesses hereto:**

__[*Signature*]__	__[*Signature*]__
_ _[*Typed name*]_ _	_ _[*Typed name*]_ _
Witness	**Witness**

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Source: Estate Planning/Complete Plans for Small and Mid-Size Estates/12 Completing and Implementing the Estate Plan/ 4. Necessary Language in Deeds in Certain Situations/§12.49 a. Severing Joint Tenancy of Unmarried Persons

4. Necessary Language in Deeds in Certain Situations

§12.49 a. Severing Joint Tenancy of Unmarried Persons

If both joint tenants agree to sever their joint tenancy in real property, the deed can be titled "Grant Deed Severing Joint Tenancy" and language similar to the following should be included:

***A,* an unmarried _ _[*man/woman*]_ _, and *B,* an unmarried _ _[*man/woman*]_ _, who acquired title as joint tenants, hereby sever their joint tenancy interests and grant to *A,* an unmarried _ _[*man/woman*]_ _, _ _[*his/her*]_ _ undivided one-half interest and to *B,* an unmarried _ _[*man/woman*]_ _, _ _[*his/her*]_ _ undivided one-half interest, as tenants in common.**

When one party to a joint tenancy wishes to sever a joint tenancy in order to hold title as a tenant in common and thus have the ability to transfer his or her interest to a trust or distribute his or her interest at death to a third party, the deed should include grantee and grantor language similar to the following:

***A,* a joint tenant, who acquired title with *B,* as joint tenants, hereby severs _ _[*his/her*]_ _ joint tenancy interest and grants to *A,* an unmarried _ _[*man/woman*]_ _, _ _[*his/her*]_ _ undivided one-half interest, as a tenant in common.**

After the property description, assessor's parcel number, and commonly known address, and before the signature, add a statement similar to the following, whether the deed is executed by both parties or only one acting unilaterally:

The purpose of this deed is to sever the joint tenancy created under the _ _[*Grant Deed/Deed*]_ _ dated _ _[*date*]_ _, and recorded _ _[*date*]_ _ as Instrument No. _ _[*number*]_ _, in the Official Records of _ _[*name of county*]_ _ County, California.

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Source: Estate Planning/Complete Plans for Small and Mid-Size Estates/12 Completing and Implementing the Estate Plan/§12.50 b. Statement by Grantors of Intent to Transmute Property

§12.50 b. Statement by Grantors of Intent to Transmute Property

A transfer of property by a husband and wife from joint tenancy or tenancy in common to themselves as community property is a transmutation from separate property interests in the property to community property. Under Fam C §852(a), a transmutation is not valid unless it is made in writing "by an express declaration that is made, joined in, consented to, or accepted by the spouse whose interest in the property is adversely affected." The following statement, therefore, should be included above the grantors' (*i.e.,* husband's and wife's) signatures:

Grantors declare that they make, join in, consent to, and accept this deed for the purpose of transmuting joint tenancy property to community property under California Family Code §852.

Some attorneys do not include language similar to that above because it may be unnecessary under California case law, which has held that the express declaration requirements are satisfied by the use of the word "grant" in the deed (rather than "transfer"). See, *e.g., Estate of MacDonald* (1990) 51 C3d 262, 273, 272 CR 153; *Marriage of Starkman* (2005) 129 CA4th 659, 664, 28 CR3d 639; *Estate of Bibb* (2001) 87 CA4th 461, 468, 103 CR2d 415.

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Source: Estate Planning/Complete Plans for Small and Mid-Size Estates/12 Completing and Implementing the Estate Plan/§12.51 c. Statement by Grantees Regarding Community Property With Right of Survivorship

§12.51 c. Statement by Grantees Regarding Community Property With Right of Survivorship

A deed by a husband and wife transferring real property from joint tenancy, tenancy in common, or community property to themselves as community property with right of survivorship must meet the requirements of CC §682.1(a). Note that if the transfer is from joint tenancy or tenancy in common, the cautious practitioner should include language regarding the grantors' intent to transmute their interests from separate property to community property similar to that found in §12.50.

Although CC §682.1(a) states that the transfer documents "may be accepted in writing on the face of the document by a statement signed or initialed by the grantees," and such language seems permissive rather than mandatory, that apparently is not the case. See 22 CEB Est Plan Rep 76 (Dec. 2000). The analysis of the Assembly Committee on Judiciary (Aug. 25, 2000) states:

> It is important to note that this proposal *affirmatively requires* the signature or initials of the parties on the face of the document… to demonstrate the clear intention of the parties to take this property as community property with rights of survivorship. [Emphasis added.]

PRACTICE TIP: Prudent counsel will have the husband and wife, as grantees, sign or initial language such as the following on the face of the document to indicate that they accept ownership in the form of community property with right of survivorship:

Grantees declare that they accept this transfer with the intention of taking title to the above-described property as community property with right of survivorship.

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§12.52 5. Recording the Deed and Filing Related Documents

Although a deed does not have to be recorded to be effective, it must be recorded in order to give public notice of the grantee's interest in the property and to establish the grantee's priority to the property. CC §§1214, 1217. In addition, recording the deed removes any question about whether the deed has been effectively delivered by the grantor. Because the deed is to be recorded, the grantor's signature must be acknowledged and the acknowledgment must comply with CC §1189. Although a variety of government officials can acknowledge the grantor's signature, acknowledgment is most easily accomplished by a notary public. CC §1181.

When the deed is recorded, a Preliminary Change of Ownership Report must also be submitted. See §§12.54-12.57. In addition, a parent-child or grandparent-grandchild exclusion form, as well as other forms required by individual counties, may have to be prepared and filed. See §§12.58-12.61.

The attorney is advised to record the deed and related documents for the client. Unless there is a reason to record the deed immediately, such as when a death or sale is imminent, the deed can be mailed to the recorder's office in the county in which the property is located. If death is imminent and the deed unilaterally terminates a joint tenancy, *i.e.,* without the joinder or consent of the other joint tenant(s), the deed must be recorded in the county where the property is located before the severing joint tenant's death. CC §683.2(c)(1). The deadline is extended to 7 days following death if the instrument was executed and acknowledged before a notary within 3 days of death. CC §683.2(c)(2). Another situation when immediate recordation may be crucial arises when the deed makes a gift of property from the client to a third person. Failure to record the deed before the client's death could raise questions about whether there was a completed gift, because there was no delivery.

Execution of a deed transferring real property from the client as an individual to the client as trustee of his or her revocable trust constitutes a completed delivery. However, recording the document before the client dies can preclude disgruntled heirs or beneficiaries, title companies, or the Internal Revenue Service from arguing that the transfer to the trust was not completed before death.

The recorder's office will charge for recording a deed, usually one charge for the first page and an extra charge for each additional page. There is an additional charge if any page of the document is not standard size. Some counties also charge a "survey monument fund fee" if the legal description consists of anything other than a condominium or a complete lot in a subdivision.

PRACTICE TIP: When mailing the deed for recording, the attorney should include the following:

- The original deed;
- The Preliminary Change of Ownership Report;
- A copy of the deed and PCOR for return to the office;
- A self-addressed stamped envelope; and
- A check in an amount "Not To Exceed $___." The recorder's office should be instructed to send the recorded deed to the client and an endorsed-filed copy of the deed to the attorney's office.

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§12.53 a. Required Recording Information

Under Govt C §27320, the name of the person at whose request the document is recorded must be noted. "Grantee," "beneficiary," and vendee," in place of a person's name, are not sufficient. "Recording requested by," or its equivalent, and the name of the requesting person must appear on the face of the document. The top 2½ inches vertically of the first page must be reserved for recording information; the upper left-hand corner of the document, measuring 2½ inches vertically by 3½ inches horizontally, must be reserved to show the name of the person requesting recordation and the return name and address; the upper right-hand corner of the document must be reserved for the recorder's office stamp. Govt C §27361.6.

The recorder must mail (or deliver, if specified) the instrument to the person named in the instrument or, if no one is named, to the person leaving it for recording. Govt C §27321. To enable the recorder to comply, a return name and address should appear on each document to be recorded.

To be accepted for recording, the deed must show the name and address to which further tax statements may be mailed. Govt C §27321.5. The notice may be placed below the recording address. The attorney should have the original deed returned to the client, not to the attorney's office, because the assessor's office frequently sends the tax statements to the address listed for returning the recorded document.

Most attorneys place the required information discussed above in the top left-hand corner of the deed, stating on separate lines "Recording Requested By," "When Recorded Mail To," and "Mail Tax Statements To" and entering the name and address of the client starting on the fourth line.

Finally, the deed must show, either on its face or on a separate document attached to the deed after recording and before return to the party, the amount of the documentary transfer tax due. Rev & T C §11932. However, because the tax is imposed only if there is a purchase of real property, no tax is due when a deed merely transfers title as part of an estate plan (which is most likely the case in a simple estate plan) and is not the result of a sale. Immediately below the bottom line of the caption, the following language should be inserted: "No Documentary Transfer Tax Due—No Consideration" or "No Documentary Transfer Tax Due—Not Pursuant To Sale," or some similar statement.

NOTE: Any county that imposes a documentary transfer tax may require that each deed transferring real property include the assessor's parcel number (APN) on the document, although failure to include the APN does not invalidate the document and incurs no liability. Rev & T C §11911.1. Nevertheless, even if the county does not require it, the deed should include the APN.

Many counties have their own additional requirements for recording deeds, and the attorney should check local rules. For example, most counties now require that the transfer tax statement referenced above cite the section of the Revenue and Taxation Code that grants the exemption (found in Rev & T C §§11921-11930). However, the recorders for the various counties do not interpret these exemptions consistently, so it is important to check with the appropriate recorder in each county.

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§12.54 b. Preliminary Change of Ownership Report

A Preliminary Change of Ownership Report (commonly known as a "PCOR") must be filed whenever there is a change in ownership of real property. Rev & T C §480(a). The PCOR form tells the county assessor whether a change of ownership has occurred that will necessitate property tax reassessment. The PCOR must be filed when the deed is recorded (Rev & T C §480(e)), and it may be attached to or accompany the deed (Rev & T C §480(d)). Recordation of the deed cannot be denied or delayed, however, because of the failure to file a PCOR, or the filing of an incomplete statement (Rev & T C §480(e)); but an additional recording fee of $20 may be required (Rev & T C §480.3(b)). If the deed is recorded without the concurrent filing of a PCOR, the statement must be filed with the assessor no later than 45 days from the date the change in ownership occurs, except if the change in ownership has resulted by reason of death. Rev & T C §480(a). The PCOR may also be mailed to the assessor's office. Rev & T C §480(g).

When the PCOR is filed with the recorder's office, the recorder must, "as soon as possible," transmit the original or a true copy to the assessor along with a copy of every recorded document. Rev & T C §480(f).

Invariably, the issue of property taxes will arise in meeting with clients. There is nothing more dear to a California real property owner than a low base-year valuation for property tax purposes. As explained in chap 3, most transfers implementing a client's estate plan (*e.g.,* transfer of property from the single client to himself or herself as trustee of his or her trust or from spouses to themselves as trustees of their revocable trust) qualify for an exclusion from the definition of change in ownership. The exclusion is reported on the PCOR.

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Source: Estate Planning/Complete Plans for Small and Mid-Size Estates/12 Completing and Implementing the Estate Plan/§12.55 (1) Obtaining PCOR Form

§12.55 (1) Obtaining PCOR Form

Each county has its own PCOR form based on the generic Board of Equalization form (BOE-502-A) provided to the counties. Generally, however, the county recorder's and assessor's offices will accept forms from other counties (with the county name changed) rather than requiring the county's own form. PCOR forms are available from the recorder's or assessor's office in the county where the property is located, or online. In addition, most legal form software programs for estate planning or real estate have PCOR forms. The PCOR form is updated periodically, so it is good practice to make sure that the most recent form is used.

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Source: Estate Planning/Complete Plans for Small and Mid-Size Estates/12 Completing and Implementing the Estate Plan/§12.56 (2) Completing PCOR

§12.56 (2) Completing PCOR

The PCOR must include the grantor and grantee names exactly as they appear on the deed, as well as the assessor's parcel number, the property address, and the address where the tax statements should be sent. All the boxes in Part I must be checked Yes or No. If the attorney believes that the transfer qualifies for an exclusion that is not listed in Part I, there is a line on the form where the attorney can explain why the transfer is not subject to reassessment. The form does not provide much space, so the explanation may have to be continued on an attachment. The requirements are contained in Rev & T C §480(c).

Because the client in most cases will not be selling the property, Parts II, III, and IV do not need to be completed. The grantee/transferee of the property must sign the PCOR certification at the end of the form under penalty of perjury. Rev & T C §480(c).

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Source: Estate Planning/Complete Plans for Small and Mid-Size Estates/12 Completing and Implementing the Estate Plan/§12.57 (3) Form: Preliminary Change of Ownership Report (BOE-502-A)

§12.57 (3) Form: Preliminary Change of Ownership Report (BOE-502-A)



BOE-502-A (FRONT) REV. 10 (8-07)

PRELIMINARY CHANGE OF OWNERSHIP REPORT

FOR RECORDER'S USE ONLY

[To be completed by transferee (buyer) prior to transfer of subject property in accordance with section 480.3 of the Revenue and Taxation Code.] A Preliminary Change of Ownership Report must be filed with each conveyance in the County Recorder's office for the county where the property is located; this particular form may be used in all 58 counties of California.

THIS REPORT IS NOT A PUBLIC DOCUMENT

SELLER/TRANSFEROR: _____

BUYER/TRANSFEREE: _____

ASSESSOR'S PARCEL NUMBER(S) _____

PROPERTY ADDRESS OR LOCATION: _____

MAIL TAX INFORMATION TO: Name _____

Address _____

NOTICE: A lien for property taxes applies to your property on January 1 of each year for the taxes owing in the following fiscal year, July 1 through June 30. One-half of these taxes is due November 1, and one-half is due February 1. The first installment becomes delinquent on December 10, and the second installment becomes delinquent on April 10. One tax bill is mailed before November 1 to the owner of record. **You may be responsible for the current or upcoming property taxes even if you do not receive the tax bill.**

The property which you acquired may be subject to a supplemental assessment in an amount to be determined by the _____ Assessor. For further information on your supplemental roll obligation, please call the _____ Assessor at _____.

PART I: TRANSFER INFORMATION *(please answer all questions)*

YES	NO	
☐	☐	A. Is this transfer solely between husband and wife (addition of a spouse, death of a spouse, divorce settlement, etc.)?
☐	☐	B. Is this transaction only a correction of the name(s) of the person(s) holding title to the property (for example, a name change upon marriage)? Please explain _____
☐	☐	C. Is this document recorded to create, terminate, or reconvey a lender's interest in the property?
☐	☐	D. Is this transaction recorded only as a requirement for financing purposes or to create, terminate, or reconvey a security interest (e.g., cosigner)? Please explain _____
☐	☐	E. Is this document recorded to substitute a trustee of a trust, mortgage, or other similar document?
☐	☐	F. Did this transfer result in the creation of a joint tenancy in which the seller (transferor) remains as one of the joint tenants?
☐	☐	G. Does this transfer return property to the person who created the joint tenancy (original transferor)?
		H. Is this a transfer of property:
☐	☐	1. to a revocable trust that may be revoked by the transferor and is for the benefit of the ☐ transferor ☐ transferor's spouse?
☐	☐	2. to a trust that may be revoked by the Creator/Grantor who is also a joint tenant, and which names the other joint tenant(s) as beneficiaries when the Creator/Grantor dies?
☐	☐	3. to an irrevocable trust for the benefit of the ☐ Creator/Grantor and/or ☐ Grantor's spouse?
☐	☐	4. to an irrevocable trust from which the property reverts to the Creator/Grantor within 12 years?
☐	☐	I. If this property is subject to a lease, is the remaining lease term 35 years or more including written options?
☐	☐	*J. Is this a transfer between ☐ parent(s) and child(ren)? ☐ or from grandparent(s) to grandchild(ren)?
☐	☐	*K. Is this transaction to replace a principal residence by a person 55 years of age or older? Within the same county? ☐ Yes ☐ No
☐	☐	*L. Is this transaction to replace a principal residence by a person who is severely disabled as defined by Revenue and Taxation Code section 69.5? Within the same county? ☐ Yes ☐ No
☐	☐	M. Is this transfer solely between domestic partners currently registered with the California Secretary of State?

*If you checked yes to J, K or L, you may qualify for a property tax reassessment exclusion, which may result in lower taxes on your property. **If you do not file a claim, your property will be reassessed.**

Please provide any other information that will help the Assessor to understand the nature of the transfer.

If the conveying document constitutes an exclusion from a change in ownership as defined in section 62 of the Revenue and Taxation Code for any reason other than those listed above, set forth the specific exclusions claimed: _____.

Please answer all questions in each section. If a question does not apply, indicate with "N/A." Sign and date at bottom of second page.

PART II: OTHER TRANSFER INFORMATION

A. Date of transfer if other than recording date _____

B. Type of transfer *(please check appropriate box)*:

☐ Purchase ☐ Foreclosure ☐ Gift ☐ Trade or Exchange ☐ Merger, Stock, or Partnership Acquisition

☐ Contract of Sale — Date of Contract _____

☐ Inheritance — Date of Death _____ ☐ Other *(please explain)*: _____

☐ Creation of Lease ☐ Assignment of a Lease ☐ Termination of a Lease ☐ Sale/Leaseback

☐ Date lease began _____

☐ Original term in years (including written options) _____

☐ Remaining term in years (including written options) _____

Monthly Payment _____ Remaining Term _____

C. Was only a partial interest in the property transferred? ☐ Yes ☐ No

If **yes**, indicate the percentage transferred _____%.

Print

BOE-502-A (BACK) REV. 10 (8-07)

Please write Assessor's Parcel Number(s): _____

Please answer, to the best of your knowledge, all applicable questions, then sign and date. If a question does not apply, indicate with "N/A."

PART III: PURCHASE PRICE AND TERMS OF SALE

A. CASH DOWN PAYMENT OR value of trade or exchange *(excluding closing costs)* Amount $_____

B. FIRST DEED OF TRUST @ _____ % interest for _____ years. Pymts./Mo. = $_____(Prin. & Int. only) Amount $_____
- ☐ FHA(_____ Discount Points) ☐ Fixed rate ☐ New loan
- ☐ Conventional ☐ Variable rate ☐ Assumed existing loan balance
- ☐ VA (_____ Discount Points) ☐ All inclusive D.T. ($ _____ Wrapped) ☐ Bank or savings & loan
- ☐ Cal-Vet ☐ Loan carried by seller ☐ Finance company

Balloon payment ☐ Yes ☐ No Due Date _____ Amount $ _____

C. SECOND DEED OF TRUST @ _____ % interest for _____ years. Pymts./Mo. = $_____(Prin. & Int. only) Amount $_____
- ☐ Bank or savings & loan ☐ Fixed rate ☐ New loan
- ☐ Loan carried by seller ☐ Variable rate ☐ Assumed existing loan balance

Balloon payment ☐ Yes ☐ No Due Date _____ Amount $ _____

D. OTHER FINANCING: Is other financing involved not covered in (b) or (c) above? ☐ Yes ☐ No Amount $_____

Type _____ @_____ % interest for _____ years. Pymts./Mo. = $_____(Prin. & Int. only)
- ☐ Bank or savings & loan ☐ Fixed rate ☐ New loan
- ☐ Loan carried by seller ☐ Variable rate ☐ Assumed existing loan balance

Balloon payment ☐ Yes ☐ No Due Date _____ Amount $ _____

E. WAS AN IMPROVEMENT BOND ASSUMED BY THE BUYER? ☐ Yes ☐ No Outstanding Balance: Amount $_____

F. TOTAL PURCHASE PRICE *(or acquisition price, if traded or exchanged, include real estate commission if paid)*
TOTAL ITEMS A THROUGH E $

G. PROPERTY PURCHASED ☐ Through a broker ☐ Direct from seller ☐ From a family member ☐ Other *(please explain):* _____

If purchased through a broker, provide broker's name and phone number: _____

Please explain any special terms, seller concessions, or financing and any other information that would help the Assessor understand the purchase price and terms of sale: _____

PART IV: PROPERTY INFORMATION

A. TYPE OF PROPERTY TRANSFERRED:
- ☐ Single-family residence
- ☐ Multiple-family residence (no. of units: _____)
- ☐ Commercial/Industrial
- ☐ Other (Description: i.e., timber, mineral, water rights, etc. _____)
- ☐ Agricultural
- ☐ Co-op/Own-your-own
- ☐ Condominium
- ☐ Timeshare
- ☐ Manufactured home
- ☐ Unimproved lot

B. IS THIS PROPERTY INTENDED AS YOUR PRINCIPAL RESIDENCE? ☐ Yes ☐ No
If yes, enter date of occupancy _____ (month) / _____ (day) , 20 _____ (year) or intended occupancy _____ (month) / _____ (day) , 20 _____ (year)

C. IS PERSONAL/BUSINESS PROPERTY INCLUDED IN PURCHASE PRICE (i.e., furniture, farm equipment, machinery, etc.) (other than a manufactured home subject to local property tax)? ☐ Yes ☐ No
If yes, enter the value of the personal/business property included in the purchase price $ _____ *(Must attach itemized list.)*

D. IS A MANUFACTURED HOME INCLUDED IN PURCHASE PRICE? ☐ Yes ☐ No
If yes, how much of the purchase price is allocated to the manufactured home? _____
Is the manufactured home subject to local property tax? ☐ Yes ☐ No What is the decal number? _____

E. DOES THE PROPERTY PRODUCE INCOME? ☐ Yes ☐ No **If yes**, is the income from:
☐ Lease/Rent ☐ Contract ☐ Mineral rights ☐ Other *(please explain):* _____

F. WHAT WAS THE CONDITION OF THE PROPERTY AT THE TIME OF SALE?
☐ Good ☐ Average ☐ Fair ☐ Poor

Please explain the physical condition of the property and provide any other information (such as restrictions, etc.) that would assist the Assessor in determining the value of the property:

CERTIFICATION

OWNERSHIP TYPE (☑)
- Proprietorship ☐
- Partnership ☐
- Corporation ☐
- Other _____ ☐

I certify that the foregoing is true, correct and complete to the best of my knowledge and belief. This declaration is binding on each and every co-owner and/or partner.

NAME OF NEW OWNER/CORPORATE OFFICER		TITLE
SIGNATURE OF NEW OWNER/CORPORATE OFFICER ▶		DATE
NAME OF ENTITY *(typed or printed)*		FEDERAL EMPLOYER ID NUMBER
ADDRESS *(typed or printed)*	PHONE NUMBER (8 a.m. - 5 p.m.)	E-MAIL ADDRESS *(optional)*

(Note: The Assessor may contact you for additional information.)
If a document evidencing a change of ownership is presented to the recorder for recordation without the concurrent filing of a preliminary change of ownership report, the recorder may charge an additional recording fee of twenty dollars ($20).

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Source: Estate Planning/Complete Plans for Small and Mid-Size Estates/12 Completing and Implementing the Estate Plan/§12.58 c. Parent-Child or Grandparent-Grandchild Exclusion Form

§12.58 c. Parent-Child or Grandparent-Grandchild Exclusion Form

The appropriate box in Part I of the PCOR must be checked if the property transfer qualifies for the parent-child or grandparent-grandchild exclusion. If that box is checked, a separate State Board of Equalization form, Claim for Reassessment Exclusion for Transfer Between Parent and Child (commonly known as the "parent-child exclusion form") (BOE-58-AH) or the parallel form for grandparent-grandchild transfers (BOE-58-G) must be filed. Each county has its own Claim for Reassessment Exclusion forms that are based on the generic Board of Equalization forms provided to the counties. Obtain forms from the assessor's office in the county where the property is located. In most counties, the forms may be obtained online.

The parent-child exclusion or grandparent-grandchild exclusion form must be filed within 3 years after the transfer (or before the transfer of the property to a third party, whichever is earlier), or 6 months after the mailing of a notice of supplemental or escape assessment, whichever is later. Rev & T C §63.1(e). (For parent-child transfers before September 30, 1990, see Rev & T C §63.1(e); grandparent-grandchild transfers became eligible for the reassessment exclusion effective March 27, 1996.) Note, however, that counties can charge a one-time processing fee of no more than $175 to recover costs incurred by the county assessor due to the failure of an eligible transferee to file a parent-child or grandparent-grandchild exclusion form after two written requests by the assessor (Rev & T C §63.1(j)), and many counties follow this procedure.

PRACTICE TIP: It is good practice to file the exclusion form with the county assessor's office when the attorney receives a copy of the recorded deed from the recorder's office. Always request that the assessor return a copy stamped with the date of receipt, as it is quite common for the assessor's office to send a request to the client to file the form many months after the deed has been recorded. The assessor will generally accept a photocopy of the previously filed and stamped form. The attorney should explain to the client the importance of promptly forwarding any notices or requests from the assessor's office to the attorney's office. There may be a time limit for responding to the notice or request. Also, not all assessors provide written notice of whether the exclusion has been granted. Therefore, it is important to advise the client to notify the attorney immediately if the property tax bill suddenly increases substantially.

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Source: Estate Planning/Complete Plans for Small and Mid-Size Estates/12 Completing and Implementing the Estate Plan/§12.59 (1) Form: Claim for Reassessment Exclusion for Transfer Between Parent and Child (BOE-58-AH)

§12.59 (1) Form: Claim for Reassessment Exclusion for Transfer Between Parent and Child (BOE-58-AH)



BOE-58-AH (FRONT) REV. 11 (8-06)

CLAIM FOR REASSESSMENT EXCLUSION FOR TRANSFER BETWEEN PARENT AND CHILD

(Section 63.1 of the Revenue and Taxation Code)

California law provides, with certain limitations, that a "change in ownership" does not include the purchase or transfer of:

- The principal residence between parents and children, and/or
- The first $1,000,000 of other real property between parents and children.

IMPORTANT: In order to qualify for this exclusion, a claim form must be completed and signed by the transferors and a transferee and filed with the Assessor. A claim form is timely filed if it is filed within three years after the date of purchase or transfer, or prior to the transfer of the real property to a third party, whichever is earlier. If a claim form has not been filed by the date specified in the preceding sentence, it will be timely if filed within six months after the date of mailing of a notice of supplemental or escape assessment for this property. If a claim is not timely filed, the exclusion will be granted beginning with the calendar year in which you file your claim. Complete all of Sections A, B, and C and answer each question or your claim may be denied. Proof of eligibility, including a copy of the transfer document, trust, or will, may be required.

Please Note:

a. This exclusion only applies to transfers that occur on or after November 6, 1986.
b. In order to qualify, the real property must be transferred from parents to their children or children to their parents.
c. If you do not complete and return this form, it may result in this property being reassessed.

A. PROPERTY

ASSESSOR'S PARCEL NUMBER

PROPERTY ADDRESS		CITY
RECORDER'S DOCUMENT NUMBER		DATE OF PURCHASE OR TRANSFER
PROBATE NUMBER *(if applicable)*	DATE OF DEATH *(if applicable)*	DATE OF DECREE OF DISTRIBUTION *(if applicable)*

The disclosure of social security numbers is mandatory as required by Revenue and Taxation Code section 63.1. [See Title 42 United States Code, section 405(c)(2)(C)(i) which authorizes the use of social security numbers for identification purposes in the administration of any tax.] A foreign national who cannot obtain a social security number may provide a tax identification number issued by the Internal Revenue Service. The numbers are used by the Assessor and the state to monitor the exclusion limit. This claim form is not subject to public inspection.

B. TRANSFEROR(S)/SELLER(S) *(additional transferors please complete "B" on the reverse)*

1. Print full name(s) of transferor(s) _____ _____
2. Social security number(s) _____ _____
3. Family relationship(s) to transferee(s) _____ _____
   If adopted, age at time of adoption _____ _____
4. Was this property the transferor's principal residence? ☐ Yes ☐ No
   If **yes,** please check which one of the following exemptions was granted on this property in the transferor's name:
   ☐ Homeowners' Exemption ☐ Disabled Veterans' Exemption
5. Have there been other properties that qualified for this exclusion? ☐ Yes ☐ No
   If **yes,** please attach a list of all previous transfers that qualified for this exclusion. (This list should include for each property: the County, Assessor's parcel number, address, date of transfer, names of all the transferees/buyers, and family relationship. Transferor's principal residence must be identified.)
6. Was only a partial interest in the property transferred? ☐ Yes ☐ No **If yes,** percentage transferred _____ %
7. Was this property owned in joint tenancy? ☐ Yes ☐ No
8. If the transfer was through the medium of a trust, you must attach a copy of the trust.

CERTIFICATION

I certify (or declare) under penalty of perjury under the laws of the State of California that the foregoing and all information hereon, including any accompanying statements or documents, is true and correct to the best of my knowledge and that I am the parent or child (or transferor's legal representative) of the transferees listed in Section C. I knowingly am granting this exclusion and will not file a claim to transfer the base year value of my principal residence under Revenue and Taxation Code section 69.5.

SIGNATURE OF TRANSFEROR OR LEGAL REPRESENTATIVE	DATE
SIGNATURE OF TRANSFEROR OR LEGAL REPRESENTATIVE	DATE
MAILING ADDRESS	DAYTIME PHONE NUMBER ( )

(Please complete applicable information on reverse side.)

Print

C. TRANSFEREE(S)/BUYER(S) *(additional transferees please complete "C" below)*

1. Print full name(s) of transferee(s) _____ _____
2. Family relationship(s) to transferor(s) _____ _____

   If adopted, age at time of adoption _____

   If step-parent/step-child relationship is involved, was parent still married to or in a registered domestic partnership *(registered means registered with the California Secretary of State)* with stepparent on the date of purchase or transfer? ☐ Yes ☐ No

   If **no**, was the marriage or registered domestic partnership terminated by: ☐ Death ☐ Divorce/Termination of partnership

   If terminated by death, had the surviving stepparent remarried or entered into a registered domestic partnership as of the date of purchase or transfer? ☐ Yes ☐ No

   If in-law relationship is involved, was the son-in-law or daughter-in-law still married to or in a registered domestic partnership with the daughter or son on the date of purchase or transfer? ☐ Yes ☐ No

   If **no**, was the marriage or registered domestic partnership terminated by: ☐ Death ☐ Divorce/Termination of partnership

   If terminated by death, had the surviving son-in-law or daughter-in-law remarried or entered into a registered domestic partnership as of the date of purchase or transfer? ☐ Yes ☐ No

3. ALLOCATION OF EXCLUSION (If the full cash value of the real property transferred exceeds the one million dollar value exclusion, the transferee must specify on an attachment to this claim the amount and allocation of the exclusion that is being sought.)

CERTIFICATION

I certify (or declare) under penalty of perjury under the laws of the State of California that the foregoing and all information hereon, including any accompanying statements or documents, is true and correct to the best of my knowledge and that I am the parent or child (or transferee's legal representative) of the transferors listed in Section B; and that all of the transferees are eligible transferees within the meaning of section 63.1 of the Revenue and Taxation Code.

SIGNATURE OF TRANSFEREE OR LEGAL REPRESENTATIVE	DATE
MAILING ADDRESS	DAYTIME PHONE NUMBER
	( )

Note: The Assessor may contact you for additional information.

B. ADDITIONAL TRANSFEROR(S)/SELLER(S) *(continued)*

NAME	SOCIAL SECURITY NUMBER	SIGNATURE	RELATIONSHIP

C. ADDITIONAL TRANSFEREE(S)/BUYER(S) *(continued)*

NAME	RELATIONSHIP

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Source: Estate Planning/Complete Plans for Small and Mid-Size Estates/12 Completing and Implementing the Estate Plan/§12.60 (2) Form: Claim for Reassessment Exclusion for Transfer From Grandparent to Grandchild (BOE-58-G)

§12.60 (2) Form: Claim for Reassessment Exclusion for Transfer From Grandparent to Grandchild (BOE-58-G)



BOE-58-G (FRONT) REV. 10 (8-07)

CLAIM FOR REASSESSMENT EXCLUSION FOR TRANSFER FROM GRANDPARENT TO GRANDCHILD

(Section 63.1 of the Revenue and Taxation Code)

California law provides, **with certain limitations,** that a "change in ownership" does not include the purchase or transfer of:

- The principal residence from grandparents to grandchildren, and/or
- The remainder of the first $1,000,000 of other real property between parents and children.

IMPORTANT: In order to qualify for this exclusion, a claim form must be completed and signed by the transferors and a transferee and filed with the Assessor. A claim form is timely filed if it is filed within three years after the date of purchase or transfer, or prior to the transfer of the real property to a third party, whichever is earlier. If a claim form has not been filed by the date specified in the preceding sentence, it will be timely if filed within six months after the date of mailing of a notice of supplemental or escape assessment for this property. If a claim is not timely filed, the exclusion will be granted beginning with the calendar year in which you file your claim. Complete all of Sections A, B, and C and answer each question or your claim may be denied. Proof of eligibility, including a copy of the transfer document, trust, or will, may be required.

Please Note:

a. This exclusion only applies to transfers that occur on or after March 27, 1996.
b. In order to qualify, all the parents of that grandchild **must** be deceased as of the date of purchase or transfer. As used in the preceding sentence, parents are those persons who qualify under section 63.1 as children of the grandparents. However, for transfers that occur on or after January 1, 2006, a son-in-law or daughter-in-law of the grandparent that is a stepparent to the grandchild need not be deceased in meeting the condition that "all of the parents" of the grandchild must be deceased.
c. The real property must be transferred from grandparents to their grandchildren.
d. Failure to complete and return this form may result in this property being reassessed.

A. PROPERTY

ASSESSOR'S PARCEL NUMBER	PROPERTY ADDRESS
DATE OF PURCHASE OR TRANSFER	RECORDER'S DOCUMENT NUMBER
DATE OF DEATH OF GRANDPARENT *(if applicable)*	PROBATE NUMBER *(if applicable)*

B. TRANSFEROR(S)/SELLER(S) (GRANDPARENTS)

1. Print full name(s) of transferor(s) _____
2. Was this property the principal residence of the transferor? ☐ Yes ☐ No
   If **yes,** please check which one of the following exemptions was granted on this property in your name:
   ☐ Homeowners' Exemption ☐ Disabled Veterans' Exemption
3. Was real property other than the principal residence of the transferor transferred? ☐ Yes ☐ No
4. Was only a partial interest in the property transferred? ☐ Yes ☐ No
5. Did you own this property as a joint tenant? ☐ Yes ☐ No
6. If the transfer was through the medium of a trust, you must attach a copy of the trust.
7. Print name(s) of child(ren) of transferor(s)/seller(s) who is(are) the parent(s) of transferee(s) (grandchild):

_____

_____

CERTIFICATION

I certify (or declare) under penalty of perjury under the laws of the State of California that the foregoing and any accompanying statements are true and correct to the best of my knowledge and that I am the grandparent (or their legal representative) of the transferees listed in Section C. I knowingly am granting this exclusion and will not file a claim to transfer the base year value of my principal residence under Revenue and Taxation Code section 69.5.

SIGNATURE OF TRANSFEROR OR LEGAL REPRESENTATIVE ▶	DATE
SIGNATURE OF TRANSFEROR OR LEGAL REPRESENTATIVE ▶	DATE
MAILING ADDRESS	DAYTIME PHONE NUMBER

(Please complete applicable information on reverse side.)

Print

C. TRANSFEREE(S)/BUYER(S) (GRANDCHILD) *(additional transferees please complete "C" below)*

1. Print full name(s) of transferee(s) _____

   Family relationship(s) to transferor(s) _____

   If adopted, age at time of adoption _____ Adopted by whom? _____

2. Parent: Name of direct descendent of grandparent (son or daughter) _____

   Date of death of direct descendent _____

   (Direct descendent must be deceased in order to qualify for this exclusion. *Please provide death certificate.*)

   Social security number of direct descendent: _____

The disclosure of social security numbers is mandatory as required by Revenue and Taxation Code section 63.1. [See Title 42 United States Code, section 405(c)(2)(C)(i) which authorizes the use of social security numbers for identification purposes in the administration of any tax.] A foreign national who cannot obtain a social security number may provide a tax identification number issued by the Internal Revenue Service. The numbers are used by the Assessor and the state to monitor the exclusion limit. This claim is not subject to public inspection.

   a. Was deceased parent married or in a registered domestic partnership *(registered means registered with the California Secretary of State)* as of the date of death? ☐ Yes ☐ No

   b. Is the spouse or registered domestic partner of the deceased parent a *(check one)*:
      ☐ Parent of the grandchild *(go to question c).*
      ☐ Stepparent of the grandchild *(a stepparent to the grandchild need not be deceased in meeting the condition that "all of the parents" of the grandchild must be deceased) (go to question 3).*

   c. Had surviving spouse/partner remarried or entered into a registered domestic partnership as of the date of purchase or transfer? ☐ Yes ☐ No

      If **yes,** date of marriage or registration of the domestic partnership must have occurred prior to the date of purchase or transfer to qualify for exclusion. Date of marriage/partnership registration: _____ *(Please provide marriage or partnership certificate.)*

      If **no,** surviving spouse/partner is still considered a child of grandparents and must also be deceased prior to the purchase or transfer to qualify for exclusion. Date of death _____ *(Please provide death certificate.)*

3. Did transferee receive a principal residence from parents? (If transferee has already received an excludable principal residence, or interest therein, from parents, then the purchase or transfer of a principal residence from grandparents will not be excluded as a principal residence but will be applied toward the one million dollar ($1,000,000) full cash value limit exclusion of other real property received from parents.) ☐ Yes ☐ No

   If yes: County: _____ Assessor's Parcel Number: _____

4. Did transferee receive real property other than a principal residence from deceased parent who is a direct descendent of grandparents? (If transferee has already received an excludable principal residence, or interest therein, from parents, then the purchase or transfer of a principal residence from grandparents will not be excluded as a principal residence but will be applied toward the one million dollar ($1,000,000) full cash value limit exclusion of other real property received from deceased parents.) ☐ Yes ☐ No

   If yes, attach list of all previous transfers (include for each property: the county, Assessor's parcel number, situs address, date of transfer, names of all transferees, and the family relationship).

Note: *The Assessor may require additional legal documentation to support the above answers.*

CERTIFICATION

I certify (or declare) under penalty of perjury under the laws of the State of California that the foregoing and any accompanying statements are true and correct to the best of my knowledge and that I am the grandchild (or their legal representative) of the transferors listed in Section B. I certify that all my parents who qualify as children of my transferor grandparents are deceased as of the date of transfer or purchase, and that all of the transferees are eligible transferees within the meaning of section 63.1 of the Revenue and Taxation Code.

SIGNATURE OF TRANSFEREE OR LEGAL REPRESENTATIVE ▶	DATE
MAILING ADDRESS	DAYTIME PHONE NUMBER

C. ADDITIONAL TRANSFEREE(S)/BUYER(S) (GRANDCHILD) *(continued)*

NAME	RELATIONSHIP

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Source: Estate Planning/Complete Plans for Small and Mid-Size Estates/12 Completing and Implementing the Estate Plan/§12.61 d. Other Documents That May Be Required

§12.61 d. Other Documents That May Be Required

Depending on the situation and the county, other documents may need be filed when the deed is recorded. Some counties require a form called a Transfer Tax Affidavit in addition to the PCOR. If the attorney does not have much experience recording documents in a particular county, it is a good idea to call the county recorder's office to find out what is required. Increasingly, this information may be found on the website of the county recorder's or assessor's office.

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Source: Estate Planning/Complete Plans for Small and Mid-Size Estates/12 Completing and Implementing the Estate Plan/§12.62 C. Beneficiary Designations

§12.62 C. Beneficiary Designations

As discussed in chap 7, certain assets such as retirement plans and life insurance pass by beneficiary designation. If the client does not complete a beneficiary designation, the retirement plan document or the life insurance policy will provide for a default beneficiary, which is usually either the client's estate or closest living relative. From an estate planning perspective, this is usually an undesirable result. Therefore, it is extremely important that the attorney review the client's beneficiary designations as part of the process of implementing the estate plan. In many cases the beneficiary designations will have to be revised to coordinate with the rest of the client's estate plan.

PRACTICE TIP: Many institutions that offer IRAs have specific rules about allowable designation formats. Some absolutely forbid use of attachment pages; some do not allow designation of a custodian under the California Uniform Transfers to Minors Act (CUTMA) if the account owner wants to name a minor as a beneficiary; some require immediate payout of the entire account unless the beneficiary is a surviving spouse. If the designations do not comply with the plan's requirements, the client's entire estate plan may be defeated, especially if the retirement plan is a significant part of the client's estate. If the account custodian's rules do not permit the client to make appropriate beneficiary designations, the client may be best served by transferring the account to a new custodian, if possible. The attorney should also explain to the client that the forms must be received and accepted by the plan before the client's death or they will not be effective.

WARNING: Note that many plans do not send notice of acceptance or rejection of the language used in the beneficiary designation. Many plans, in fact, do not even send notice that the form has been received unless specifically requested by the sender.

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§12.63 1. Retirement Plans

The tem "retirement plan" as used in this chapter refers to an income-tax-deferred plan—typically an IRA (IRC §408(a)), IRC §§401(k), 403(b), 457, or other plan to which pre-tax dollars are contributed by the client—or to qualified plans under IRC §§401(a), 404(a). The assets in the retirement plan grow tax-free and then are subject to income tax when they are received by the client or are required to be distributed to the client. Because of the income-tax-deferred nature of retirement plans, the beneficiary designations must be carefully considered. See discussion in chap 7.

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Source: Estate Planning/Complete Plans for Small and Mid-Size Estates/12 Completing and Implementing the Estate Plan/§12.64 a. Spouse as Beneficiary

§12.64 a. Spouse as Beneficiary

In almost all simple estate plans for a married client, the client's spouse will be named as the primary beneficiary of the client's retirement plan. If the client wants to name someone other than his or her spouse as beneficiary of the client's retirement plan, the client's spouse usually must sign a spousal waiver agreeing to the beneficiary designation. See IRC §417(a). The waiver must be in a writing signed by the nonparticipant spouse that is notarized or witnessed and that acknowledges the effect of the waiver. The waiver can be revoked during the 90-day period ending on the annuity starting date. The waiver of a qualified joint and survivor annuity (QJSA) also must designate a beneficiary or form of benefit that cannot be changed without spousal consent, unless the spouse's waiver expressly permits changes without further consent. IRC §417(a)(2); Treas Reg §1.401(a)-20, A-31(b). Most qualified plans have their own waiver forms.

NOTE: If the attorney is representing both spouses, the spouse who is waiving his or her rights in the retirement plan should be advised to seek separate counsel. See Cal Rules of Prof Cond 3-310.

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Source: Estate Planning/Complete Plans for Small and Mid-Size Estates/12 Completing and Implementing the Estate Plan/§12.65 b. Minor as Beneficiary

§12.65 b. Minor as Beneficiary

Most clients with children, if married, name their children as contingent beneficiaries of their retirement plans and, if unmarried, name the children as primary beneficiaries. If a minor is named as a beneficiary, the custodianship language in §12.66 should be included in the beneficiary designation form. Naming a trust for the benefit of the minor as the designated beneficiary of a retirement plan is complex and should not generally be part of an estate plan for a simple estate. See discussion in chap 7.

PRACTICE TIP: Some plans do not accept designation of a custodian for a minor beneficiary under a Uniform Transfers to Minors Act (*e.g.,* the California Uniform Transfers to Minors Act (CUTMA) (Prob C §§3900-3925)). A plan may require establishment of a court-supervised guardianship of the estate. It is good practice to contact the plan administrator to discuss acceptable beneficiary designation formats. The client should be advised if his or her wishes cannot be accomplished.

NOTE: When CUTMA is used for an inter vivos gift, the maximum age to hold the asset is 21, while a testamentary gift may be held until age 25, but only if specified in the instrument naming the custodian. Prob C §3920.5. Otherwise, the custodianship terminates at age 18. Prob C §3920.

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Source: Estate Planning/Complete Plans for Small and Mid-Size Estates/12 Completing and Implementing the Estate Plan/§12.66 c. Form: Uniform Transfers to Minors Act Designation of Minor as Beneficiary

§12.66 c. Form: Uniform Transfers to Minors Act Designation of Minor as Beneficiary

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12.66-1 Uniform Transfers to Minors Act designation of minor as beneficiary

I designate _ _[*name(s), birth date(s), and Social Security number(s)*]_ _ as beneficiar(ies), each to receive a separate equal share, subject to the following provisions:

1. The share of any beneficiary who is then under age _ _[*insert age, up to 25*]_ _ shall be paid to_ _[*name*]_ _ as custodian for that beneficiary until age _ _[*insert age, up to 25*]_ _ under the Uniform Transfers to Minors Act of any state. If _ _[*name*]_ _ for any reason fails or ceases to act as custodian, the share of any beneficiary who is under age _ _[*insert age, up to 25*]_ _ shall be paid to _ _[*name*]_ _ as custodian for that beneficiary until age _ _[*insert age, up to 25*]_ _ under the Uniform Transfers to Minors Act of any state.

2. If a beneficiary is then deceased, the share of the deceased beneficiary shall be distributed to the beneficiary's children, if any, in separate equal shares, and if none, shall be added to the shares of the other beneficiaries.

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§12.67 d. Trust as Beneficiary

Attorneys planning a simple estate are advised not to name a trust as a beneficiary of a retirement plan. The Internal Revenue Code requirements and Treasury regulations regarding "designated beneficiaries" are complex (see California Estate Planning §21.44 (Cal CEB 2002)) and failure to conform to them could cause serious income tax consequences and derail the client's entire estate plan. See discussion in chap 7.

NOTE: The assets in a Roth IRA are not subject to potential income tax liability or the predeath minimum distribution rules that apply to other types of IRAs. However, the requirements of Treas Reg §1.401(a)(9)-4, A-5(b) regarding naming a trust as beneficiary must still be met. Moreover, if the client is married, the attorney must consider the spouse's rights in the Roth IRA before naming a trust as a beneficiary instead of the spouse.

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Source: Estate Planning/Complete Plans for Small and Mid-Size Estates/12 Completing and Implementing the Estate Plan/§12.68 2. Life Insurance

§12.68 2. Life Insurance

Married clients generally name each other or a trust, if they have created one, as primary beneficiaries of life insurance policies and name their children, if any, as the contingent beneficiaries. Unmarried clients with children generally name their children as the beneficiaries of their life insurance policies. If the children are minors and the client has established a trust, the trust should be named. If there is no trust and the children are minors, the Uniform Transfers to Minors Act language found in §12.66 can be used.

The following language is recommended if a trust is named as a beneficiary:

The Trustee of the _ _[*name of trust*]_ _ Trust dated _ _[*date*]_ _, as amended at the time of the insured's death.

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Source: Estate Planning/Complete Plans for Small and Mid-Size Estates/12 Completing and Implementing the Estate Plan/§12.68A 3. Annuities

§12.68A 3. Annuities

If the client owns an annuity, the attorney should review the annuity contract before making a recommendation about an appropriate beneficiary designation, as there may be different payout options available (or not available) depending on the identity of the annuity beneficiary.

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4. Beneficiary Designation Forms

§12.69 a. Who Prepares Forms

The attorney and client should discuss who will complete the beneficiary designation forms. Ideally, the attorney prepares the form for the client's signature when the client signs the other estate planning documents. The attorney is thus assured that the beneficiary designation form is completed and signed correctly.

In many cases, however, the attorney does not prepare the beneficiary designation form. Often, the client does not want to pay additional fees for preparation of beneficiary designation forms. In addition, the client may not be prepared and will not have the forms ready for the attorney to complete. If the attorney does not prepare the forms, the attorney should prepare a document or memorandum for the client to refer to when the client prepares them. The memorandum should describe the proper beneficiary designation for the client's retirement plans and insurance policies. See form in §12.70.

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Source: Estate Planning/Complete Plans for Small and Mid-Size Estates/12 Completing and Implementing the Estate Plan/§12.70 b. Form: Beneficiary Designation Memorandum to Client

§12.70 b. Form: Beneficiary Designation Memorandum to Client

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12.70-1 Beneficiary designation memorandum

[*Attorney's letterhead*]

To: _ _[*name of client*]_ _

From: _ _[*name of attorney*]_ _

Date: _ _[*date*]_ _

Re: Designation of Beneficiaries

In order to coordinate your IRAs, qualified plans, and life insurance policies with your estate plan, we recommend that you revise all beneficiary designations according to the following instructions.

BENEFICIARY DESIGNATIONS SHOULD BE REVIEWED EVERY FIVE YEARS, WHENEVER YOU REVIEW OR REVISE YOUR ESTATE PLAN, OR WHEN YOU CHANGE EMPLOYMENT, RETIRE, OR ACQUIRE NEW IRAs OR LIFE INSURANCE POLICIES.

Pension Plan, 401(k), IRAs, and Other Qualified Retirement Plans

The following language is suggested for beneficiary designations for your 401(k), profit-sharing plan, IRAs, and other qualified retirement plans. If a minor named as a beneficiary is not your child or issue of your child, the language in provisions 1 and 2 should be appropriately adapted:

Primary Beneficiary(ies): My _ _[*spouse/partner/child(ren)/friend/sibling/other*]_ _, _ _[*name(s), birth date(s), and Social Security number(s)*]_ _**.**

Secondary (Alternate) Beneficiary(ies): My _ _[*child(ren)/spouse/partner/friend/sibling/other*]_ _**,** _ _[*name(s)*]_ _**.**

[*If child(ren) are primary or secondary beneficiary(ies), the following language can be used for designations above*]

My child(ren), _ _[*name(s), birth date(s), and Social Security number(s)*]_ _**,** _ _[*and any other child hereafter born or adopted by me*]_ _**, in separate equal shares, subject to the following provisions:**

1. If a child named as a beneficiary is then deceased, the share of the deceased beneficiary shall be distributed to the beneficiary's children, if any, in equal shares, and if none, shall be added to the shares of the other children.

[*Add one of the following alternatives*]

[*Alternative 1: Payments to custodian designated by trustee*]

2. If any beneficiary is then under age twenty-five (25), the beneficiary's share shall be paid to a person designated in a notarized writing by the Trustee of the _ _[*name of trust*]_ _ **Trust dated** _ _[*date*]_ _**, as custodian for the beneficiary until age 25 under the Uniform Transfers to Minors Act of any state.**

[*Alternative 2: Payments to custodian named by account holder*]

2. If any beneficiary is then under age twenty-five (25), the beneficiary's share shall be paid to _ _[*name*]_ _ **as custodian for the beneficiary until age twenty-five (25) under the Uniform Transfers to Minors Act of any state. If** _ _[*name*]_ _ **for any reason fails or ceases to act as custodian, the share of any beneficiary under age**

twenty-five (25) shall be paid to _ _[*name of successor*]_ _ as custodian for the beneficiary until age twenty-five (25) under the Uniform Transfers to Minors Act of any state.

[*Continue*]

Nonqualified (e.g., Deferred Compensation) Plans

The following language is suggested for nonqualified employer-sponsored plans, such as deferred compensation plans that require lump-sum payments on retirement:

Primary Beneficiary(ies): _ _[*see options listed above*]_ _

Secondary Beneficiary(ies): _ _[*(options listed above)/The Trustee of the* _ _[*name of trust*]_ _ *Trust dated* _ _[*date*]_ _*, as amended at the time of the participant's death*]_ _

Annuities

We cannot recommend a beneficiary designation for an annuity unless we review the contract for that annuity. Please contact us if you would like to discuss this service and the associated costs.

Life Insurance Policies

The following language is suggested for beneficiary designations for life insurance policies that you own:

Primary Beneficiary:

The Trustee of the _ _[*name of trust*]_ _ **Trust dated** _ _[*date*]_ _**, as amended at the time of the insured's death.**

Procedure for Changing Designated Beneficiaries

You can obtain change of beneficiary forms from your company's plan administrator, the financial institution administering your retirement account, or the insurance company. Some institutions and plan administrators have specific requirements for beneficiary designations. Frequently forms that you are given to complete do not accommodate designations in the format suggested here.

Please let us know if you would like our assistance in preparing the forms or in discussing the format with the plan administrator. In any case, please send or fax us copies of the completed change of beneficiary forms before you submit them to the institution so that we can review them. We would appreciate copies of completed change of beneficiary forms for our records.

Our fax number is: _ _[*number*]_ _**.**

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Source: Estate Planning/Complete Plans for Small and Mid-Size Estates/12 Completing and Implementing the Estate Plan/§12.71 c. Completing Forms

§12.71 c. Completing Forms

Whether the client or the attorney prepares the form, it is very important that the preparer read the instructions for completing the form. Typically, if individuals are named as beneficiaries, the form should not be difficult to complete. However, if minors are named as beneficiaries and the language suggested in §12.66 for custodianship is used, there may not be enough room on the form. Although it is generally acceptable to use an attachment, some plans will not accept attachments of any sort. The attachment should have the name of the client-participant, his or her account number (which frequently is or includes the client's social security number), the name of the plan, and the beneficiary designation. All signatures required on the original form should be duplicated on the attachment.

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Source: Estate Planning/Complete Plans for Small and Mid-Size Estates/12 Completing and Implementing the Estate Plan/§12.72 d. Confirmation of Acceptance of Beneficiary Designation

§12.72 d. Confirmation of Acceptance of Beneficiary Designation

When the form is submitted by the attorney or client, he or she should request documentation from the plan provider or insurance company that the beneficiary designation was received and accepted. In addition, if the client is preparing the beneficiary designation form, the attorney should request that the client send the attorney a copy of the beneficiary designation for the attorney's files.

PRACTICE TIP: Beneficiary designations are not effective until received and accepted by the asset holder. If the client is terminally ill and close to death, it may be necessary to deliver the beneficiary designation to the proper receiving agent by courier.

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§12.73 IV. CONCLUDING ESTATE PLAN

As this chapter illustrates, representation of the client usually does not conclude when the client signs the estate planning documents. Typically, additional documents must be prepared and filed to implement the client's wishes. Regardless of whether the attorney or the client is responsible for funding the revocable trust, recording deeds, and/or preparing and filing beneficiary designations, follow-up by the attorney is essential to assure the successful implementation of the estate plan.

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§12.74 A. Transmittal Letter to Client

The transmittal of the signed estate planning documents to the client provides an excellent opportunity to state where the original documents are being held and remind the client of other important information, such as the importance of delivering a copy of the advance health directive to the client's physician and agent, funding the trust if the client executes a trust, reviewing, executing, or changing beneficiary designations, and updating the estate plan in the future. Some attorneys state in the final transmittal letter that they have completed their work for the client and that they are closing the file. The client may contact the attorney for additional work in the future, but any additional work will require a new contract. Some attorneys also state a time frame during which the attorney will remain available to help with transfers if the clients have any problems completing the transfers and to answer any questions about the client's estate plan or about the information in the letter.

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Source: Estate Planning/Complete Plans for Small and Mid-Size Estates/12 Completing and Implementing the Estate Plan/§12.75 B. Form: Sample Transmittal Letter

§12.75 B. Form: Sample Transmittal Letter

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12.75-1 Sample transmittal letter

[*Attorney's letterhead*]

_ _[*Date*]_ _

_ _[*Name of client*]_ _
_ _[*Address of client*]_ _

Dear _ _[*name*]_ _:

Enclosed are copies of the following estate planning documents, signed by you on _ _[*date*]_ _:

1. _ _[*Name of trust*]_ _ Trust (the "Trust");

2. Assignment;

3. Will;

4. Advance Health Care Directive; and

5. Durable Power of Attorney for Financial Management.

The original documents are enclosed in the manila envelope labeled "Original Documents," and should be placed in _ _[*your safe deposit box/(other location discussed with client)*]_ _. As we discussed, you should advise your executor/successor trustee and the agents under your durable power of attorney and advance health care directive how and where they can obtain these documents when necessary.

You should now destroy your superseded estate planning documents, including your _ _[*list superseded documents*]_ _. Please note, your new _ _[*codicil/trust amendment*]_ _ makes changes to the original document, but does not supersede all provisions, so you should retain both the original and this codicil/amendment.

We have also enclosed extra copies of the advance health care directive. You should give copies of this document to your agents and to your doctor for his or her records. We also recommend that you carry a copy with you when you travel.

Funding the Revocable Trust

We have included a copy of the instructions for funding the Trust that we gave you at our meeting on _ _[*date*]_ _, for your reference. The deed transferring your residence to you as Trustee of your Trust has been mailed to the county recorder. The original recorded deed will be returned to you directly from the recorder's office.

The original Trustee's Certification of Trust dated _ _[*date*]_ _, is also enclosed for your use when transferring accounts to the Trust. For your future use, we have also enclosed an original undated Trustee's Certification of Trust, which can be dated and signed by you in the presence of a notary when needed.

Beneficiary Designations

To ensure implementation of your estate plan, you should review and revise the beneficiary designations in

your _ _[*IRAs, 401(k)s, other qualified plans*]_ _, and your insurance policies in accordance with the memorandum recommending beneficiary designations that we gave to you at the time you signed your documents. Please let us know if you would like assistance in preparing change of beneficiary forms.

Pay-on-Death Accounts and Joint Accounts

The terms of your Will and Trust do not govern the distribution of any pay-on-death accounts or joint accounts. On your death, those accounts will pass as provided in the documents you and the bank, brokerage, or other institution used to create the account. These types of accounts can seriously alter the distribution of your assets, and thus undermine your estate plan. You should periodically review your accounts—including your brokerage accounts—to make sure that, if they are pay-on-death accounts, they do not conflict with your estate plan as we have discussed. This review is best done by contacting the institutions where the accounts were created. Please let us know if you need assistance with this process.

Changes to Your Estate Plan

Your estate planning documents have been executed with certain formalities and should be changed or revoked only through similar procedures. Adding notes in the margin, or striking out or adding words to the documents, even if initialed or signed by you, will probably not be effective to change the terms of the documents and will cause confusion among your beneficiaries regarding your intent. You should review any proposed changes or amendments with a knowledgeable attorney.

Estate Plan Review

We have prepared your estate planning documents based on the information you have provided to us. You should contact us or another attorney if you want to make changes to your estate plan or if there are changes in the tax and estate laws. A substantial increase in your net worth, a change in the type of assets you own, or a decision to purchase life insurance may require changes in your estate plan. You should also review your plan if there are changes in your marital status or family circumstances or in the event of serious illness. If you move to another state, you must have an attorney familiar with the trust and estate laws of the new state review your estate plan.

Please let us know if you have any questions about your documents or other estate planning alternatives or the issues outlined in this letter.

[*If appropriate, add*]

This concludes our representation of you. We will do no further work for you unless you request additional services. It has been a pleasure working with you.

[*Continue*]

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _

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Source: Estate Planning/Complete Plans for Small and Mid-Size Estates/12 Completing and Implementing the Estate Plan/§12.76 C. Calendaring and Follow-Up Letters

§12.76 C. Calendaring and Follow-Up Letters

It is essential that the attorney calendar important follow-up dates. If the attorney is responsible for funding the trust, the deed(s) and related documentation transferring real property to the trust should be signed, notarized, and recorded immediately. The letters advising brokers and account holders regarding change in title should all be sent. The beneficiary designation forms should all be filed with the appropriate companies.

If the client is to provide information and forms to the attorney before the attorney can complete the funding process, the attorney should calendar a reminder letter to be sent to the client. If the client has not provided the necessary information within 1 to 2 months of signing the estate planning documents, the letter should be sent, emphasizing the fact that the attorney cannot complete the funding process until the client provides the necessary information. The attorney may also want to include a statement that the attorney will not do any more work until the attorney hears from the client.

If the client is responsible for funding the trust or preparing the beneficiary designation forms, the attorney should calendar a reminder letter to be sent to the client 3 to 6 months after the client signs the estate planning documents. The letter should make clear that the task that needs completion is the client's responsibility and that the attorney will not do any further work unless the client contacts the attorney. The attorney should also request the client to send copies of the completed documents to the attorney for the client's file.

PRACTICE TIP: Depending on the fee agreement and engagement with the client, it can prove difficult to be compensated for sending reminder letters to the client and doing follow-up work. Creating a routine system within the attorney's office with respect to follow-up with the client can decrease the amount of attorney time devoted to the task. More importantly, it will help the client to complete his or her estate plan.

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§12.77 D. Ongoing Representation of Client

Whether to continue to represent a client after the estate planning and related documents are complete is a subject of much debate among attorneys. Some attorneys believe that the engagement should be terminated so that the attorney is not responsible for continuing to advise the client regarding changes in the law. Although there is no authority in California law imposing an affirmative duty on the attorney to advise clients regarding changes in the law, some practitioners are concerned that such a duty may be imposed.

Ending a client engagement with respect to a client's estate planning is not particularly easy. Some attorneys send a letter to the client terminating the relationship. However, if the attorney continues to hold the client's file and/or original estate planning documents, it is unclear whether the relationship is terminated. In addition, estate planning clients often call periodically with general questions regarding their estate plan (*e.g.,* "We are buying a new house, how should we take title?"); even if a disengagement letter was sent, is the engagement revived when the attorney answers the client's question? And if so, does the attorney need to send another disengagement letter?

Another issue is whether the attorney wants to end the client engagement from a business perspective. Clients often need to review their estate plans because of changed family circumstances, increases (or decreases) in their net worth, or changes in the law. The client's future needs will provide income to the attorney. Existing clients are also the best source of future client referrals for an attorney.

Unless there is a clear reason to actively terminate the attorney-client relationship (*e.g.,* the client does not pay the attorney's fees or the client does not communicate with the attorney), the best option is to send a letter to the client defining the responsibilities of the client and attorney, respectively, going forward. Whether this information is included in the initial engagement letter, the "transmittal letter" described in §12.74, or in a separate letter sent after the estate plan is implemented, the attorney should advise the client about the client's responsibility to inform the attorney of significant changes, such as a dramatic increase or decrease in the value of assets, or a divorce, death, marriage, or birth of a child that requires rethinking the estate plan.

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Table of Statutes, Regulations, and Rules

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